Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, *Appellant,* *vs.* THE MARSHALL SILVER MINING CO. AND THE COLORADO CENTRAL CONSOLIDATED MINING CO., *Appellees.*	No. 204.

BRIEF FOR APPELLANT.

J. H. HICKCOX, JR.,
JAMES K. REDINGTON,
Specially, for Appellant.

MILANS, PR., 519 7TH STREET, N. W.

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES,
Appellant,
vs.
THE MARSHALL SILVER MINING CO.
AND
THE COLORADO CENTRAL CONSOLIDATED MINING CO.,
Appellees.
No. 204.

BRIEF OF APPELLANT.

STATEMENT.

The United States, by the Attorney-General and its attorney for the proper district, filed a bill in equity in the Circuit Court of the United States, for the District of Colorado, against the appellees, to vacate and cancel a patent for certain public lands issued to defendant, The Marshall Silver Mining Company, on the 8th day of June, 1874. The Colorado Central Consolidated Mining Company is the successor in interest of the Marshall Company, its co-defendant. The substantial charges of the bill are that the patent in question was procured by the Marshall Company by fraud in the suppression of the material fact that the premises were, in part, owned and claimed adversely

under a prior location, entitled to patent; that the patent so granted to the Marshall Company was the result of legal inadvertence and mistake, and that its issue was without authority of and against law. The defendants demurred to the bill and, upon the overruling thereof, filed seperate answers; testimony was taken; upon final hearing, the court below dismissed the bill, and the United States appealed.

The following are conceded or undisputed facts shown by the record, viz:—

On the 28th day of September, 1867, certain premises being a part of the public domain known as the Cayuga Lode, were located as a mineral claim by one Walter N. Webster and others under the laws of the United States, (page 146,) and the title to this location had, on the 14th day of December, 1872, vested in said Walter N. Webster, Erskine McClellan and Joseph Rist, in the following undivided interests, said McClellan one half, said Webster one fourth and said Rist one fourth, (pp. 147, 148). On the last mentioned date the said Webster and McClellan filed in the local office at Central City, Colorado, an application for patent for said premises, signed by themselves alone, and accompanied this application with the necessary survey, field notes, proofs etc. required by law and regulations of the department, (pp. 139 to 150). This survey was ordered by the Surveyor-General, November 20th, 1872, returned and verified by the deputy November 25th, 1872, and approved by the Surveyor-General December 5th, 1872. The plat and notice of application were duly posted, and the notice was published, for the full period of sixty days as required by law, (pp. 141, 143, 144, 145). The notice of application, including the plat of survey posted on the claim and in the register's office, was in the names of Webster, McClellan and Joseph Rist, and the proof of the pos-

ting of the same upon the land was attested by said Rist as well as his co-owners, (p. 141).

On the said 14th day of December, 1872, the defendant, the Marshall Silver Mining Company, also filed in the local land office at Central City, an application for patent for certain mineral premises know as Tunnel Lode No. 5, (pp. 4, 20). The title of the applicants was founded upon a discovery or location made March 13, 1871, (pp. 163, 164,) three years and a half subsequent to that of the Cayuga, (p. 146). This survey was ordered December 6th, 1872, returned and verified by the deputy December 10th, 1872, and approved by the Surveyor-General December 11th, 1872, (p. 189,) all of said dates being subsequent to the approval of the Cayuga survey. The application, (p. 167,) embracing $\frac{45}{100}$ acres of surface ground, and the plat and field notes showing the same, *did not include any land in conflict with the Cayuga claim*, (p. 188; Ex. J., p. 223; p. 176, map; pp. 53, 54). Neither this plat nor the field notes upon which it was based were ever transmitted to the General Land Office, (pp. 4, 20, 162, 179,) but at a subsequent date other papers were substituted and forwarded under circumstances hereinafter stated.

On the 15th day of February, 1873, and during the sixty days period of publication of the Cayuga application, as aforesaid, the Marsahall Company filed in the land office an adverse claim alleging title and possessory right *to the intersecting portion of the two claims*, excluded as above stated from the Marshall application, (p. 150,) and upon the 14th day of March, 1873, commenced suit of ejectment against the Cayuga claimants for possession of the said premises, (p. 152).

Pending this suit, to wit, April 28th, 1873, one Hugh Butler filed, in the local office, a paper purporting to be an authorization from Joseph Rist, to withdraw the Cayuga application to the extent of his (Rist's) inter-

est therein, (pp. 146, 150, 153,) and in the files of the Cayuga case in the General Land Office now appears what purports to be a copy of a letter written by the register and receiver, addressed to "Erskine McClellan, *et al.*, Georgetown, Colo.," notifying them that Rist, by his attorney, Butler, had filed a withdrawal of said application; that the effect thereof was to render the entire application null and void, and that no application for the Cayuga Lode or any portion thereof was, therefore, pending, (p. 150). May 12th, 1873, still pending said suit in court, the register and receiver transmitted to the Surveyor-General a letter notifying him that althongh the survey of the Cayuga had been made and approved by him prior to that of the Marshall Company, yet that the withdrawal above noted necessarily vitiated and rendered void the entire application, and that there was no application pending for the Cayuga claim, (p. 187).

May 13th, 1873, still pending said suit in court, the Marshall Company applied to the Surveyor-General for an amended plat and field notes of the Marshall claim, (p. 187). This was allowed; May 19th, 1873, the Deputy-Surveyor filed an amended plat and field notes, and May 20th, 1873, they were approved by the Surveyor-General, (pp. 170, 171). The field notes and plat, as thus amended, *showed no conflict or interference with the Cayuga survey and made no mention whatever of any such claim,* (pp. 170, 177–map). Without posting or publication, the amended papers were filed with those already forming the Marshall application in the office of the register and receiver; the original plat and field notes which had been regularly posted and published were suppressed, and upon the record thus made up, the Marshall Company was allowed to enter the premises and the papers were transmitted to the General Land Office as the basis of a patent, all of which was done without pretence of any notice what-

ever to the Cayuga claimants. In the papers thus transmitted there was nothing except possibly the copy of the plat attached to the proof of posting, (p. 176,) to show the original conflict with the Cayuga or any other claim and nothing whatever to show the fact of the Cayuga application, the filing of the adverse claim, the withdrawal by Rist, the action thereon by the local officers or the pendency of the ejectment suit.

On the 30th day of January, 1874, the suit of ejectment mentioned above was dismissed by the plaintiff, at its own cost, (p. 156,) and therenpon such further proceedings were had, that the Commissioner of the General Land Office, upon the papers thus presented to him, and without any knowledge whatever of the fact of the conflict or the existence of the Cayuga claim, or of the proceedings thereon as above mentioned, issued a patent to the Marshall Company for the entire premises covered by the amended survey. This patent was dated June 8th, 1874, (p. 176).

On the 30th day of November, 1881, the said Cayuga claimants, having filed in due form all the papers necessary to complete their application under law and the rules and regulations of the Land Department, were allowed by the register and receiver to enter the land covered by their survey; and, January 31st, 1882, upon consideration thereof, the Commissioner of the General Land Office, issued to the claimants, Erskine McClellan, Joseph Rist and Walter N. Webster, a patent for the whole of said premises, (p. 159).

November 17th, 1879, the Marshall Company conveyed said Tunnel Lode No. 5, to George Turnbull, (p. 220,) and upon the 15th of December, 1879, Turnbull conveyed to the defendants, the Colorado Central Consolidated Mining Company, (p. 221).

In respect to the transactions above recited, commencing with the withdrawal of the undivided interest of Rist in the Cayuga claim and ending with the

patent to the Marshall Company, the bill charges fraud, conspiracy and confederation upon the register and receiver of the local land office, the said Hugh Butler, Frank J. Marshall, the President of the Marshall Company, G. W. Hall and others unknown; that by reason thereof the said Marshall patent was fraudulently and wrongfully obtained from the United States and the said McClellan, Webster and Rist wrongfully and fraudulently deprived of the legal title to a large portion of said Cayuga Lode and surface ground, and that the said Marshall patent is a cloud upon the title of the United States and upon the title of the said McClellan, Webster and Rist. It also charges upon both companies, and their privies, and the officers and trustees of said companies, at the time title was acquired under color of said patent, full knowledge that such patent had been so fraudulently obtained and of the rights and equities of said McClellan, Webster and Rist.

As to facts denied by the answers and supposed to be material to the case at bar the following, though the subject of conflicting testimony, are clearly established:

1. That neither McClellan nor Webster, the owners of a three fourth undivided interest in the Cayuga claim, had any knowledge whatever, prior to about the year of 1880 or 1881, of any withdrawal by Rist of his interest in the application or of any subsequent events above cited in connection with the patenting of the Marshall claim, or the patent itself; and that neither of them, although at that time residing in Georgetown, Colorado, ever received the alleged letter of the register and receiver of April 30th, 1873.

2. That the Colorado Central Consolidated Company was in fact a practical reorganization of the Marshall Company, composed in great part of the same indi-

viduals; and that both companies and the officers and trustees of each were at all times fully aware of all the facts hereinbefore recited in connection with the issuing of the Marshall patent and at all times had full notice of the rights and equities of the Cayuga claimants.

ASSIGNMENT OF ERRORS.

I. The facts above recited and either conceded or satisfactorily established, show that the Marshall patent was procured by means of fraud practiced by the patentees upon the United States. It was error in the court below not to so hold and decide, and so holding, to enter a decree vacating the patent and forever enjoining the defendants from asserting any title thereunder.

II. Upon the facts such patent was issued inadvertently and by mistake and the decree below should therefore have vacated it.

III. Upon the facts such patent was issued illegally and without authority of law and therefore the decree below should have vacated it.

IV. The United States was under obligation to the Cayuga claimants to issue to them a clear and unclouded title, evidenced by patent, to the whole of their location. Having, prior to the Cayuga patent, by inadvertence and mistake issued to the Marshall Company a patent to a portion of said premises, it became its duty to remove from the Cayuga title the cloud thus created; and upon the facts established it was entitled to a decree effectuating that object.

BRIEF.

It is settled by repeated decisions of this court, that a patent for public lands issued inadvertently; by mistake; against or without authority of law, or pro-

patent to the Marshall Company, the bill charges fraud, conspiracy and confederation upon the register and receiver of the local land office, the said Hugh Butler, Frank J. Marshall, the President of the Marshall Company, G. W. Hall and others unknown; that by reason thereof the said Marshall patent was fraudulently and wrongfully obtained from the United States and the said McClellan, Webster and Rist wrongfully and fraudulently deprived of the legal title to a large portion of said Cayuga Lode and surface ground, and that the said Marshall patent is a cloud upon the title of the United States and upon the title of the said McClellan, Webster and Rist. It also charges upon both companies, and their privies, and the officers and trustees of said companies, at the time title was acquired under color of said patent, full knowledge that such patent had been so fraudulently obtained and of the rights and equities of said McClellan, Webster and Rist.

As to facts denied by the answers and supposed to be material to the case at bar the following, though the subject of conflicting testimony, are clearly established:

1. That neither McClellan nor Webster, the owners of a three fourth undivided interest in the Cayuga claim, had any knowledge whatever, prior to about the year of 1880 or 1881, of any withdrawal by Rist of his interest in the application or of any subsequent events above cited in connection with the patenting of the Marshall claim, or the patent itself; and that neither of them, although at that time residing in Georgetown, Colorado, ever received the alleged letter of the register and receiver of April 30th, 1873.

2. That the Colorado Central Consolidated Company was in fact a practical reorganization of the Marshall Company, composed in great part of the same indi-

viduals, and that both companies and the officers and trustees of each were at all times fully aware of all the facts hereinbefore recited in connection with the issuing of the Marshall patent and at all times had full notice of the rights and equities of the Cayuga claimants.

ASSIGNMENT OF ERRORS.

I. The facts above recited and either conceded or satisfactorily established, show that the Marshall patent was procured by means of fraud practiced by the patentees upon the United States. It was error in the court below not to so hold and decide, and so holding, to enter a decree vacating the patent and forever enjoining the defendants from asserting any title thereunder.

II. Upon the facts such patent was issued inadvertently and by mistake and the decree below should therefore have vacated it.

III. Upon the facts such patent was issued illegally and without authority of law and therefore the decree below should have vacated it.

IV. The United States was under obligation to the Cayuga claimants to issue to them a clear and unclouded title, evidenced by patent, to the whole of their location. Having, prior to the Cayuga patent, by inadvertence and mistake issued to the Marshall Company a patent to a portion of said premises, it became its duty to remove from the Cayuga title the cloud thus created; and upon the facts established it was entitled to a decree effectuating that object.

BRIEF.

It is settled by repeated decisions of this court, that a patent for public lands issued inadvertently; by mistake; against or without authority of law, or pro-

cured by fraud, may be vacated by suit in equity in the name of the United States.

United States *vs.* Stone, 2 Wall., 525.
Hughes *vs.* United States, 4 Id., 232.
Johnson *vs.* Towsley, 13 Id., 72.
Shepley *vs.* Cowen, 91 U. S., 330.
Leavenworth, etc. R. R. *vs.* U. S., 92 U. S., 733.
Moore *vs.* Robbins, 96 Id., 330.
Marquez *vs.* Frisbie, 101 Id., 473.
U. S. *vs.* Atherton, 102 Id., 372.
U. S. *vs.* Schurz, 102 Id., 378.
Moffatt *vs.* U. S., 112 Id., 24.
United States *vs.* Minor, 114 Id., 233.
Mullan *vs.* United States, 118 Id., 271.

In the recent case of the United State *vs.* Maxwell Land Grant Company, *et al.*, (121 U. S., 325,) reaffirmed in the still later case of the Colorado Coal and Iron Company *vs.* United States, the court defined the character and the amount of testimony requisite to sustain a suit of this character in these words:

"The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demand that to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be within the class of causes for which the instrument may be avoided," (p. 379).

And again:

"It should be well understood, that only that class of evidence which commands respect and that amount of it which produces conviction, shall make such an attempt successful," (p. 381).

Accepting the above rule of decision as the criterion by which the rights of the United States as well as

the Cayuga claimants are to be determined in the case at bar, we insist that the record shows:

1. That the Webster patent was procured by fraud.
2. That it was issued inadvertently, and by mistake.
3. That it was issued without authority of and against law.
4. That it ought to be vacated to protect the prior rights of, and to enable the United States to fulfil its obligations to the Cayuga claimants.

I.

THE PATENT WAS PROCURED BY FRAUD.

The act of Congress of May 10th, 1872, (17 Stat., 91,) as incorporated into the Revised Statutes, Sections 2318 to 2346 inclusive, defines the rights of claimants upon mineral lands belonging to the public domain, and prescribes the means of procuring title thereto. Such lands are open to exploration by any qualified person and any such person is entitled to exclusive possession, to the extent limited, of any claim located by him, so long as he complies with the laws of the United States, and the local laws and regulations of the mining district not in conflict therewith. Section 2324 provides, that the location to be made, must be distinctly marked on the ground and that the record of such location shall contain the name or names of the locators, the date of location, and a reference to some natural or permanent monument. Section 2335 provides, that having thus located a claim and complied with the requirements of the law, the locator may acquire a patent thereto by the following proceedings.

He must first secure from the United States Surveyor-General, for the particular district, a survey and plat and field notes of his claim, showing accurately its boundaries, which must also be distinctly marked by

monuments upon the ground. He must then post in a conspicuous place upon the claim a copy of such plat together with a notice of application to apply for a patent. He must thereupon file in the proper local office his application for patent, showing compliance with the law and accompany such application with the original plat and field notes of survey, and also a copy of the notice posted, as above, and proof of such posting by the affidavit of at least two persons. Thereupon the register is required to publish a notice that such an application has been made, for sixty days, in a paper to be by him designated as published nearest to claim, and also to post a like notice in his office for the same period. Within the sixty days of publication the claimant is required to file a certificate of the United States Surveyor-General that five hundred dollars worth of improvements have been made upon the claim and that the plat is correct, etc. At the expiration of the period of publication the claimant must file his affidavit showing that the plat and notice have been duly posted on the claim during the period of publication. If no adverse claim shall have been filed in the local office during the period of publication, it must be assumed that the claimant is entitled to a patent and, upon payment for the land, an entry is allowed. If, however, an adverse claim is filed during the period of publication, then it is provided by section 2326 that all further proceedings in the local office, except the publication of notice and filing of affidavit thereof, shall be stayed until the controversy is settled or decided by a court of competent jurisdiction or the claim waived, that within thirty days the adverse claimant shall commence proceedings in a court of competent jurisdiction to determine the right of possession to said premises, and that upon final judgment therein patent shall issue, upon certain specified proceedings, according to the decision of the court.

In the case at bar the Cayuga Lode was located September 28th, 1867. A survey and plat and field notes thereof were made in November and December, 1872, and December 14th, 1872, formal application was made for patent in the name of McClellan and Webster, for the benefit of themselves and Rist, in the proportion shown by the papers filed. All the necessary prerequisites of law having been performed and proofs made, publication of notice was commenced as required by statute.

The Webster Company had likewise, on the 14th day of December, 1872, filed an application for patent. Their location was made March 13th, 1871, three years and a half later than the Cayuga, and their survey was also subsequent to that of the latter claim. Had this application included any of the Cayuga ground, it is obvious, upon a mere statement of the facts, that the latter was the older and the better claim, and would have been so held either by the department or the local courts. But the application and survey did not conflict, but on the contrary expressly excluded the Cayuga ground. Had the claimants proceeded with this application they would have received a patent for what they claimed but for none of the Cayuga premises. Not so proceeding, however, but on the contrary abandoning, for the time being, all proceedings under their said application, they filed in the local land office, during the period of publication of the Cayuga application, an adverse claim thereto covering the premises here in question and within thirty days commenced in the local court an action involving the right of possession to the same.

The result of this proceeding was to suspend in the Land Department all further action upon the Cayuga application, the papers connected therewith lying meanwhile in the land office at Central City with no report, paper, matter or thing in the files of the

General Land Office, showing the fact of the Cayuga location, survey or application, the filing of the adverse claim or the pendency of the case in court. And this in respect to property covered by the Cayuga claim but expressly excluded from the Marshall Company's claim by their own sworn application and survey.

In other words in respect to property which, according to their own sworn application and survey, they did not claim, they adversed the Cayuga application and sent it to the local courts under the circumstances and with the effect above stated.

Thereupon the following remarkable proceedings appear upon record:

April 28th, 1873, Hugh Butler, a member of the firm of Butler & Morrison, (Butler's testimony, p. 130,) attorneys at Central City, Colorado, who appeared as attorneys for the Marshall Company in the suit then pending in the local court as above recited (pp. 155, 156,) filed in the local office at Central City the letter (p. 153,) signed "Joseph Rist, by Hugh Butler his attorney in fact," declaring that the Cayuga application had been made without his authority or consent, repudiating the same and asking that it be withdrawn so far as he was concerned and all further proceedings thereunder suspended. Among the files of the Cayuga papers as now in the General Land Office appears a paper, (p. 146,) purporting to be signed and acknowledged by Rist authorizing this action of Butler. Rist is and was at the time of the taking of the testimony deceased, (p. 31). Thereupon the local officers sent to the Surveyor-General the letter of May 12th, 1873, (p. 187,) notifying him that by reason of the withdrawal no application for the Cayuga Lode was pending; the Marshall Company sent to the Surveyor-General their letter of May 13th, 1873, asked for "amended" field notes and map; the Surveyor-

General, May 20th, 1873, so amended the field notes and plat, (pp. 170, 171,) the local officers, without any publication or posting thereof and without enclosing the original plat and field notes, or any reference thereto, forwarded the papers to the department; the Marshall Company, January 3d, 1874, by Morrison & Butler, attorneys, dismissed the suit in the local court, (p. 156,) and June 8th, 1874, the General Land Office, in utter ignorance of the proceedings theretofore had, in respect to the Cayuga claim, (testimony of Joseph Tyssowski, Chief Mineral Division, G. L. O., p. 53, *et seq.*,) patented the premises to the Marshall Company.

The foregoing recited facts are all matters of record and necessarily undisputed. In addition McClellan (p. 34) and Webster (p. 31) both testify positively and equivocally that they never received the alleged letter of the local land officers, notifying them of the action taken upon Butler's attempt to withdraw the Cayuga claim and that they never knew of the fact of the patent until 1881 or 1882. This positive testimony, the only evidence possible under the circumstances, is attempted to be overcome by the testimony of Francis J. Marshall, (p. 112,) and William A. Arnold, (p. 119). The testimony of these witnesses, however, is not even contradictory of that above recited; one is directly interested as the President of the Marshall Company, and the other was the receiver of the local office at the time of the alleged fraud and charged as a party thereto. In addition the former is directly contradicted in the rebuttal testimony at pages 78 and 89.

The act of the Marshall Company in thus procuring a patent was a positive and actual fraud upon the United States as well as upon the Cayuga claimants. It is not particularly material to know by what precise measures, influences or acts the result was accom-

plished, nor who or how many persons or officers of the United States were implicated. It is sufficient that the foregoing recited testimony plainly shows that the fact of the adverse claim by the Cayuga Company was intentionally and purposely suppressed and concealed from the department by the Marshall applicants, and that by such concealment they procured a patent which would not otherwise have issued to them. The preparation of their application so as to show no conflict; the staying of the Cayuga application by an adverse claim setting up a conflict; the pretense furnished by the Rist withdrawal; the dismissal of the ejectment suit; the suppression of the original plat and field notes and the substitution of new ones obliterating all traces of a conflict, are all flagrant and unmistakable badges of fraud, indicative of the true character of the transaction. But the material consideration is the undoubted and undisputed fact that the existence of the adverse claim was, by the proceedings had, carefully and systematically suppressed and the department left to issue a patent in ignorance thereof. This is established, in the language of this court in the Maxwell case, by evidence which commands respect and by that amount of it which produces conviction; and thus established, constitutes a positive and actual fraud.

"An intent to defraud is an emotion of the mind, "and as fraud is usually hatched in secret, *in arbore* "*cava et opaca*, there are generally no means of ascer- "taining whether it exists, except by observing the "acts of the parties engaged in any transaction, and "deducing the intent from those in accordance with "certain principles which have been established by "observation and experience. A badge of fraud is "simply an inference drawn by experience from the "customary conduct of mankind. The law adopts "and acts upon the known principles of human action.

"A badge of fraud may, therefore, be defined as a fact "calculated to throw suspicion upon a transaction and "calling for an explanation."

Bump on Fraudulent Conveyances, p. 31.
Peebles *vs.* Horton, 64 N. C., 374.
Pilling *vs.* Otis, 13 Wis., 495.
Sherman *vs.* Hogland, 73 Ind., 472.

All cases of intentional and successful employment of "any cunning, deception or artifice used to circumvent, "cheat or deceive another," are actual and positive frauds.

1 Story's Equity Jur., § 186.

And as instances of this species of fraud the authorities mention:

(*a.*) All acts, omissions and concealments, which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an improper advantage is taken.

1 Story's Equity, § 187.
Chesterfield *vs.* Janssen, 2 Ves., 155, 156.
Gale *vs.* Gale, 19 Barb., 251.

(*b.*) The misrepresentation of a material fact, or creation of a false impression, either by declaration, deed or artifice, to mislead another or cheat him, or obtain an undue advantage.

Story's Equity, § 192.
Laidlaw *vs.* Organ, 2 Wheat., 178, 195.
Pidcock *vs.* Bishop, 3 B. & C., 605.
Smith *vs.* Bank of Scotland, 1 Dow., 72.
Evans *vs.* Bicknell, 6 Ves., 173, 182.
State *vs.* Halloway, 8 Blackf., 45.
Taylor *vs.* Ashton, 11 Mees. & Welsb., 401.
Warner *vs.* Daniels, 1 Wood & Min., 103.

(*c.*) The suppression or concealment of any material

fact which the party is legally, equitably or in good conscience bound to disclose.

Story's Equity, §§ 204, 207, 217.
2 Kent's Com., 4th Ed., pp. 490, 491.
Evans *vs.* Bicknell, 6 Ves., 173, 182.
Irvine *vs.* Kirkpatrick, 3 Eng. L. & E., 17.
Juzan *vs.* Toulman, 9 Ala., 662.

(*d.*) Fraudulent suppression of deeds on other instruments in violation of, or injury to the rights of others.

Story's Equity, §§ 252, 254.
Bowles *vs.* Stewart, 1 Sch. & Lefr., 222, 225.
Dormer *vs.* Fortesque, 3 Atk., 124.
Eyton *vs.* Eyton, 2 Vern., 380.
Dalton *vs.* Coatsworth, 1 P. Wms., 733.

The Marshall Company, at the date of their application, well knew of the Cayuga claim; that it conflicted with Tunnel Lode No. 5; that it was founded on the earlier and better location, and that, with it in the way, they could not procure a patent for the premises in conflict. Hence the proceedings recited above, each one in itself a badge of fraud and all uniting to mislead and deceive the department by the concealment of the truth. This under all the authorities cited was actual fraud entitling the Government to a vacation of the patent.

II.

THE PATENT WAS ISSUED INADVERTENTLY AND BY MISTAKE.

Inadvertence and mistake by an officer in the issue of a patent is also good ground for its vacation under the authorities cited. And it is found beyond question in the case at bar. The conspiracy to suppress the fact of the adverse claim was successful and the Land Office, in utter ignorance of the fact, issued the Marshall patent.

Testimony; Joseph Tyssowski, p. 53.

This independently of the question of fraud, constitutes legal inadvertence and mistake justifying the cancellation of the patent.

U. S. *vs.* Stone, 2 Wall., 525, 535.
U. S. *vs.* Hughes, 4 Id., 232, 237.

III.

THE PATENT WAS ISSUED WITHOUT AUTHORITY OF AND AGAINST LAW.

The law of the case, as applied to the conflicting claims at the date of the Marshall patent, is entirely clear. It recognized as paramount the Cayuga claim, and founded as it was upon the earlier location and subsequent compliance with law, it should have been patented instead of the conflicting junior claim of the Marshall Company. The issue of the Marshall patent was, therefore, for the this general reason, as well as by reason of the specific defects pointed out in the testimony, issued contrary to law.

Testimony; Joseph Tyssowski, pp. 54, 55, 57, 58.

IV.

THE PATENT SHOULD BE VACATED TO PROTECT THE PRIOR RIGHTS OF THE CAYUGA CLAIMANTS.

The United States has a strict legal duty to perform in respect to this land, a duty which it must, in simple justice and good conscience, fully discharge. It must give a clear title and an unclouded patent to the parties legally entitled. The Cayuga claimants are such parties. By virtue of a prior location and subsequent compliance with the law they are entitled to a clear and unclouded patent to the premises in question, and as the patent to the Marshall Company stands in the way of the execution of this obligation by the United States, it is the clear duty of the Gov-

ernment to see that such patent is judicially annulled, and to that relief it is entitled in the pending suit.

In United States *vs.* Stone, (2 Wall., 525,) the question of the power of the United States to vacate its own patent for public land arose upon the following facts: A tract, which upon the facts proved was found to have been set apart as a military post in 1827, was, under subsequent treaties with the Delaware Indians, allotted to certain chiefs in severalty, and patented to them. The United States, by bill or information in equity, sought to set aside these patents on the ground that the officer who issued them acted without authority of law, inasmuch as the military reserve attached before the rights of the Indians under the treaties named.

The Court so held, directing the cancellation of the patents, and in delivering the opinion Mr. Justice Grier said:

"Nor is fraud in the patentee the only ground upon "which a bill will be sustained. Patents are some- "times issued *unadvisedly* or *by mistake*, where the "officer has no authority in law to grant them, or "*where another party has a higher equity and should* "*have received the patent.* In such cases the courts of "law will pronounce them void." (P. 535).

In United States *vs.* Hughes, (4 Wall., 232,) the question again arose upon the following state of fact:

Under an act of Congress, passed April 12, 1814, one Goodbee, who had succeeded to the rights of a prior settler, was, in 1822, entitled to a pre-emption right in certain lands, and to a patent of the United States as evidence thereof. He held the proper certificate of entry from the local officers, describing the tract as "lot number one," according to a special system of surveys, preceding the general system now in force. When the general system afterwards embraced the land in its surveys it was described by entirely differ-

ent technical language. Subsequently, to wit, in 1836, one Hughes entered the tracts at private entry, describing it according to the general public survey, and shortly afterwards obtained a patent. The entry was allowed and the patent was issued, *in ignorance of Goodbee's prior right*, all the officers having anything to do with it *being misled by the difference in description.*

In 1848 the true condition of affairs became known to the Government, and the United States filed an information in the nature of a bill in equity, to cancel the patent. Hughes demurred, said demurrer was sustained in the court below, and the case came to the Supreme Court of the United States at the December Term, 1850, where the decree below was reversed, the demurrer overruled, and the patent declared null and void. (11 How., 552). This decree was afterward, by consent, set aside, and the cause remanded with leave to answer. Answer having been made the case was heard below, decree made against defendants, and appeal taken to the Supreme Court, where it was finally decided at the December Term, 1866.

In delivering the unanimous opinion of the court, Mr. Justice Field said:

"This suit is brought to vacate the patent to Hughes "and compel its surrender for cancellation. It pro- "ceeds upon the ground *that the patents were issued* "*in violation of the rights of Goodbee*, or parties deriv- "ing title under him, and that *its existence impairs* "*the ability of the Government to fulfil its engage-* "*ments to him.*" * * *

"When this case was here on demurrer, the patent "was considered by the court to be a valid instrument "conveying the fee of the United States, and, until "annulled, as rendering them incapable of complying "with their engagement to Goodbee or his alienees. "Whether regarded in that aspect or as a void instru-

"ment, issued without authority, it *prima facie* "passed the title, AND THEREFORE IT WAS THE PLAIN "DUTY OF THE UNITED STATES TO SEEK TO VACATE AND "ANNUL THE INSTRUMENT, TO THE END THAT THEIR PRE-"VIOUS ENGAGEMENT MIGHT BE FULFILED BY THE TRANS-"FER OF A CLEAR TITLE, THE ONLY ONE INTENDED FOR "THE PURCHASER BY THE ACT OF CONGRESS.

"The power of a court of equity by its decree to "vacate and annul the patent, under the circum-"stances of this case, is undoubted. *Relief, when* "*deeds or other instruments are executed by mistake* "*or inadvertence of agents, as well as upon false sug-*"*gestion, is a common head of equity jurisdiction.*"

And the patent was accordingly set aside and vacated.

It will be observed that in the Hughes case no direct or positive fraud is charged or proved either as to the patentee or any public officer. Goodbee had a pre-emption right antedating the initiation of the patented claim and the patent was issued in ignorance of that fact. This condition of affairs, alone, and independently of any fraud in the procurement of the instrument, was held to be sufficient to sustain a bill in equity to vacate the patent. It is certainly conclusive of the case at bar.

In the absence of any opinion of the court below and of any briefs of counsel for defendants, we are unable to anticipate the reply to this proposition but if it rests upon any assumption of insufficiency in our claim, as a patentable right, it is sufficient to say that the record shows a prior location and subsequent compliance with every requirement of the law; and, further, that the issue of our patent was a specific adjudication of those facts, by the executive branch of the Government, conclusive upon the court, as has been repeatedly decided.

V.

THE SALE TO THE COLORADO COMPANY HAS NO EFFECT UPON THE RIGHTS OF THE UNITED STATES.

The bill charges that this company, its privies, and its trustees and officers, knew, at the time when the title or ownership was acquired under color of the Marshall patent, that the same had been fraudulently obtained and also of the rights and equities of the Cayuga claimants. And this charge is abundantly sustained by the testimony.

The Marshall Company conveyed to Turnbull, November 17th, 1879, and the latter to the Colorado Company, December 15th, 1879. George W. Hall was the partner and associate in business with F. J. Marshall, the President of the Marshall Company, from 1872 to 1879, (p. 39,) and well knew of the existence of the Cayuga claim, (p. 44,) and the circumstances connected with the issue of the Marshall patent. He was a director and treasurer of the Marshall Company, from 1876 to 1879, inclusive, (p. 67); was the principal agent in the negotiation for sale or consolidation with the Colorado Company, (p. 70,) in connection with Marshall and Turnbull, and has ever since been a stockholder and agent and superintendent of the latter company, (p. 38).

Turnbull knew of the Cayuga claim as early as 1878, (p. 72); Marshall, as already shown, was the President of the Marshall Company and managed the proceedings resulting in the patent; both of these men were active with Hall in accomplishing the formation of the new company, and the purchase price of the Marshall Company was in large part, if not all, paid in the stock of the new organization, (p. 101). As far as evidence, in such a case, can ever be produced, it is here in the case at bar and shows that the Colorado Company was simply a reorganization of the Marshall

Company and took whatever title it had, with full notice of the Cayuga claim, the fraud in the issue of the Marshall patent and the rights and equities of the Cayuga claimants. It is in no sense therefore an innocent purchaser, without notice.

As to the time which elapsed after the issue of the patent and before the commencement of the suit, neither time nor the statute of limitations runs against the United States.

Gibson *vs*, Choteau, 13 Wall., 534, Note.
U. S. *vs*. Minor, 114 U. S., p. 239.

Laches of the officers of the Government is no bar to the assertion of its rights.

Caussen, Exr., *vs*. U. S., 97 U. S., p. 584.

Aside from the interest which the United States has in the pending suit, arising from its obligations to the Cayuga claimant, as defined in Hughes *vs*. the United States, (*supra*,) it has also direct pecuniary interest in the matter, for the reason that title to a portion of the patented premises will remain in the Government, if the patent is avoided which, of itself, is sufficient to justify the bringing of the suit.

United States *vs*. Minor, 114 U. S., p. 243.

Respectfully submitted,

J. H. Hickcox, Jr.,
James K. Redington,
Specially, for the United States.

Supreme Court of the United States,

OCTOBER TERM, 1888.

THE UNITED STATES
APPELLANT.

vs.

THE MARSHALL SILVER MINING COMPANY and THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY,
APPELLEES.

No. 204.

BRIEF FOR APPELLEES.

R. S. MORRISON AND
SIMON STERNE,
Counsel for Appellees.

NEW YORK:
DOUGLAS TAYLOR, LAW PRINTER, 89 NASSAU STREET, COR. FULTON.
1888.

Supreme Court of the United States.

OCTOBER TERM, 1888.

UNITED STATES, Appellant, *vs.* THE MARSHALL SILVER MINING COMPANY and The Colorado Central Consolidated Mining Company, Appellees.	No. 204.

BRIEF OF APPELLEES.

Statement.

This is an appeal from a decree of the Circuit Court of the United States for the District of Colorado, dismissing the bill of the complainant herein seeking to set aside a patent granted by the Government of the United States, June 8, 1874, for Tunnel Lode No. 5, known as Survey Lot No. 247, issued to the Marshall Silver Mining Company between eight and nine years before the commencement of the action, which was begun in 1883.

At the time of the commencement of the action, and long prior thereto, this lode, with many others, had become the property of *bona fide* purchasers for value, known as The

Colorado Central Consolidated Mining Company, who took the same without any notice of any irregularity or fraud in relation to the issue of the said patent and with entire confidence that the same was in all respects regularly and properly issued. The action was framed in equity and sought to be maintained (1) upon the ground of a conspiracy between the claimants of the patent prior to its issue and certain officers of the United States Government located in the then Territory of Colorado, fraudulently to obtain the same, and (2) upon an alleged error of the Department in issuing the patent without re-advertisement after its survey had been amended.

The Government in its case did not attempt to prove its charge of fraud and conspiracy, and the most that was sought in the trial before the Court below was to establish, by the testimony of an officer who went into office and acquired his experience long after, a rule of procedure on the part of the mineral division of that department in relation to the issuance of patent which would have caused some hesitancy as to whether the No. 5 patent should have issued without further proof before the Land Department.

The circumstances with reference to which there is no controversy are substantially as follows: In 1867 an alleged discovery on the Cayuga was made, followed by a record or location certificate. (But that such discovery and record were wholly void will be shown later on.)

In 1871 a dispute arose between the Cayuga claimants and the Compass and Square Lode, under which a temporary injunction was obtained against the Marshall Company, but their bill was ultimately dismissed.

In 1871 the Tunnel Lode, No. 5, was discovered at considerable depth in the Marshall Tunnel, and located as the Tunnel Lode No. 5, and the company did not further rely upon their surface discovery known as the Compass and Square.

In December, 1872, each party made application for patent on their respective lodes. At that time there was a

discovery shaft on the Cayuga and a short tunnel, but the Marshall Company was in actual possession of the ground; and since that date not a stroke of work has been done in any form by the Cayuga claimants, while the Marshall Company and its vendees have since developed the property by extensive mining in connection with a systematic working of their contiguous property.

In an application for patent the first material step is a survey by an United States Deputy Mineral Surveyor and the approval thereof in the office of the local Surveyor-General. The survey of the Cayuga was approved December 5th, 1872. The survey of the No. 5 was approved December 11th, 1872. In this series of surveys each later survey-lot excludes all prior surveys without reference to priority of title, the proceeding being *ex parte*. Consequently the No. 5 survey excluded the Cayuga ground.

The Cayuga lode having obtained the first approved survey (receiving the number 231 for its survey-lot while the Tunnel lode received the number 247) it became necessary, as matters thus stood, for the Tunnel No. 5 lode to file its adverse claim, which was done within the sixty days allowed by law, followed by suit in support of the adverse claim, begun within the thirty days allowed by law, for the purpose of determining in the proper forum the controversy between the two claimants as to whom the ground should be adjudicated to belong.

But shortly after this adverse suit was brought the whole status of the controversy was changed by the fact that one of the claimants of the Cayuga withdrew his name from the application before the local land office for patent, whereupon both the Receiver and the Surveyor-General marked the Cayuga survey as cancelled and the application as withdrawn, and thereupon an amended plat was filed on the part of the Marshall Silver Mining Company, owners of the Tunnel Lode No. 5, including what had theretofore been excluded, to wit: the conflicting area claimed by each of the two lodes. This did not change

the outside lines of the No. 5 claim, which remained as theretofore 950 feet x 50 feet, and within the same corners.

The Cayuga survey and application having been cancelled, and the interfering area allowed to the No. 5, there remained nothing upon which to base the adverse claim filed against the Cayuga, and there was no further necessity to maintain the suit supporting the adverse claim. The ruling of the local Land Office in conformity to its practice and precedents in cancelling the Cayuga application and allowing the ground to that claim which in its exterior boundaries embraced such area, if an error or mistake, should have been appealed from in due course by the Cayuga claimants.

Not being appealed from, the amended plat on the No. 5 was forwarded to the General Land Office at Washington, together with the final entry made thereon, with the entire set of papers, which showed on their face that there had been an amended survey and just what such amendment effected; and in due course, in about one year after the papers were transmitted to Washington, a patent was issued to the Marshall Silver Mining Company for its Tunnel Lode No 5, Survey-Lot No. 247.

Eight years after the issuance of this patent, in utter disregard of the previous cancellation of the Cayuga survey, and notwithstanding the fact that no less than six different patents had been issued in the meantime to different persons upon surveys, each taking more or less of the Cayuga ground, in November, 1881, the Cayuga Lode was allowed to make entry in the local Land Office upon its cancelled survey, without revival thereof, and the papers being transmitted to Washington, in the space of two months a patent followed for their Cayuga claim, purporting to convey not only the interfering area already covered by the No.5 patent, but the interfering area in the meantime approved to and patented to, no less than six other survey-lots, by as many patents issued to various parties.

This action of the Department was without notice to the

No. 5 claimants or its vendees, and without re-advertisement.

The No. 5 Lode as patented June 8th, 1874, was conveyed by the Marshall Silver Mining Company to one Turnbull for a large consideration, by deed dated November 17th, 1879, recorded January 6th, 1880, and by the said Turnbull in December, 1879, conveyed to the Colorado Central Consolidated Mining Company in connection with other contiguous property, for the consideration of four hundred thousand dollars (pages 92, 220, 221).

This action is brought to set aside said patent so issued to the Marshall Company in 1874 for the purpose of securing part of the same land to the subsequent patentees, the Cayuga claimants.

A demurrer to the bill was overruled (17 Fed., 108), but after testimony taken the bill was, on hearing, dismissed, with costs.

In defense of the action of the Court below in dismissing the bill we maintain:

I.

AS TO PARTIES: NO SUBSTANTIAL INTEREST IN UNITED STATES, AND THE BILL WAS PROPERLY DISMISSED ON THAT GROUND.

The United States have no interest in this controversy, having already patented the land to both sets of claimants.

II.

If this Court set aside the No. 5 patent they cannot declare the United States to be the owners of the ground, because by the bill the United States says that it has already conveyed it to another. The result, then, is a decree in favor of the United States for the use of other parties who are not parties to the bill, and for whose benefit the United States is not competent to sue.

III.

The United States cannot maintain a bill to set aside a patent when it has no substantial interest in the controversy, and the real contention is between two sets of private parties, each claiming the title.

U. S. vs. *San Jacinto Tin Co.*, 125 U. S., 273.
U. S. vs. *Beebe*, 127 U. S., 338.

The only exception to the rule so lately stated in these cases under which appellant could have color to claim to come, would be that the United States were bound to make good its title to one of the claimants, and in this case to the Cayuga.

But it was under no contract or moral obligation so to do. The Cayuga, when the Marshall Company paid its

money and entered the land, was only pressing an *ex parte* proceeding to perfect title. It had not paid its money, made entry and received a vested right.

We contend that the No. 5 patent, if invalid at all, was necessarily either void or voidable. If void, the Cayuga patent as soon as it was issued gave its owners a complete remedy at law upon which they could have maintained ejectment, which would oust the jurisdiction of equity; and if voidable the only remedy was by proceedings in the name of the injured parties to have the senior patentee declared to hold in trust for the junior (*Johnson* vs. *Towsley*, 13 Wall., 72; *Hayner* vs. *Stanly*, 13 Fed., 217).

The ground cannot revert to the Government of the United States if this patent should be set aside. It would go to an adverse claimant, who has been a latent contestant for it since 1871. Hence the Government of the United States has no interest in the result. It is not an indemnitor of the claimants of the Cayuga lode patent, issued in 1882, to make good their title, inasmuch as these claimants obtained their patent after a patent had previously been issued by the Government of the United States on the same ground, and with knowledge that such patent had been issued; and such second patent was issued simply for the purpose, if it had any purpose at all, to give a colorable basis for the maintenance of this action. And such (the Cayuga) parties must be made parties to the bill (*U. S.* vs. *Central Pac. R.R.*, 11 Fed., 449, 458).

IV.

IRREGULARITIES IN CAYUGA PATENT ARE GREATER THAN IN PATENT COMPLAINED OF, IF ANY EXISTED IN THE LATTER.

This second patent is tainted by irregularities infinitely worse than any which are laid to the door of the patent issued to the Marshall Silver Mining Company. It was issued without any new application, without new advertisement, eight years after the application had been previously cancelled and stricken from the record and while it remained cancelled in the Local Land Office, without any notice to any person; during all which time the Marshall Mining Company or its vendees were in possession, without intimation from any source of the now alleged irregularity in the No. 5 patent.

When the No. 5 was entered and patented, supposing it was upon a wrongful ruling, the duty of the Cayuga claimants was to appeal. Or if they failed to appeal they could file their bill to have the patentee of No. 5 declared trustee to the extent of the conflict. Upon the passing of its title to the Marshall Company (also upon *ex parte* proceedings) the Government parted with all interest in the land, and it henceforth became a controversy between the claimants of the ground, either for the No. 5 to maintain its legal title or for the Cayuga to have the No. 5 patent declared to be held in trust for its benefit.

V.

No Fraud Whatever Proved.

The proof is wholly silent on the allegations of fraud. The brief of the counsel who appear and are allowed to speak in the name of the United States attempts however to make a case of constructive fraud. In this we cannot follow him for it would only mislead the Court in pursuit of shadows. The bill charged that the Register and Receiver and the attorneys and officers of the Marshall Company conspired together to obtain the withdrawal of Rist and a pretended adjudication upon such withdrawal (p. 5). The complainant offers no testimony whatever on this averment. On the contrary we call several of the parties designated, who show the whole thing to have been the voluntary action of Rist himself. And as strong collateral confirmation of their positive testimony was the fact that two years before, in 1871 (page 182), he had personally dismissed or attempted to dismiss the law proceedings begun in the territorial court over the same controversy in its original shape.

VI.

TECHNICAL IRREGULARITIES, IF ANY EXISTED, ARE NO GROUND FOR MAINTAINING THIS ACTION.

But is this irregularity sufficient to even render the patent voidable?

The want of authority which makes a patent void means a total want of authority to issue the patent; not a latent impropriety in issuing the patent (*Kahn* vs. *Old Telegraph M. Co.*, 2 Utah, 174).

There was a question for the Register and Receiver to pass upon. They did pass upon it in a semi-judicial capacity (*Johnson* vs. *Towsley*, 13 Wall., 72). No appeal was taken. Did it not become *res adjudicata?* And was not the decision right in the first instance?

Conceding for the sake of argument that the requirement that there be sixty days publication is mandatory, and that a patent issued without such publication would be voidable, nevertheless, if this land was not advertised in the No. 5 application it was advertised in the Cayuga application. It was thus in fact advertised at least once, if not twice, each application being a proceeding *in rem.* The entire papers on both applications are in evidence, and they develop the fact that the only claimants to this land were the No. 5 owners and the Cayuga claimants, and, therefore, so far as the United States Government, the patentors, is concerned, the land was advertised in compliance with law, and the question comes back as to which of two claimants are entitled to it.

It is manifest that both these parties were after the same ground. It seems, further, self-evident that when the Land Office set aside the Cayuga application the Cayuga claimants considered the matter at an end, and never attempted to revive it until the sudden life given to their proceedings by the action of the Department in 1881. But they claim they

had no notice. On the other hand p. 119) Arnold, Receiver, states that official notice was given, and his personal recollection that he learned it was received. Brune, the surveyor (p. 97), says he gave McClellan notice shortly after the withdrawal of the application, and Marshall (p. 112) says he informed his attorney.

It would be an incredible fact, if living in the immediate vicinity they did not know of every incident. Besides, knowledge is not needed where the parties were in interest, and the whole matter was spread on the face of their own records; in such case notice is imputed.

VII.

PLAINTIFF IS BARRED BY LIMITATIONS AND LACHES.

This brings us to the point of the Statute of Limitations and *Laches*.

We know the exemption claimed by the Government in these instances, but they do not apply where the Government is only protecting the alleged claims of one of its citizens (*Hayner* v. *Stanly*, 13 Fed., 218; *U. S.* v. *White*, 17 Fed., 565).

The Statute of Colorado in ejectment makes five years adverse possession under color of title a complete bar (G. S., Secs. 2186-2189). In cases of relief demanded against

fraud three years after its discovery (G. S., Sec. 2174). And the bill must allege when the fraud was discovered if apparently filed more than three years after it should presumably have been known.

This case, further, is one of mines where, more than in any other class of cases, the doctrine of *laches* is strictly maintained.

Ernest v. Vivian
33 L. J. Ch. 513.
8 Mining R. 205.
Twin Lick Oil Co. v. Marbury
91 U. S. 587
3 Mining R. 688.

VIII.

NO EQUITY IN CAYUGA, AND HENCE NO EQUITY IN BILL.

In a suit to charge the holder as trustee for another, it is not sufficient to show that it was error to grant him that patent. It must further appear that it should have issued to the plaintiff, or that plaintiff was the rightful owner.

Bohall vs. *Dilla*, 114 U. S., 47.

Smelting Co. v. Kemp 104 U. S. 636.

But if this No. 5 patent is to be set aside and the title to go to another, will this Court give it to one who has been affirmatively proved to have no valid possessory claim?

In the first place we prove by the witnesses Cox (p. 106), O'Bryan (p. 114), Kelso (p. 115), Hurd (p. 117), Old (p. 132) and Robeson (133) that they had no lode in their alleged discovery.

And when it comes to the location certificate we have an instance without precedent of four records made in four different directions so as to claim four locations from the same discovery shaft (see map inserted at page 223).

The four location certificates are found on pages 179, 180 and 181, made and recorded the same day by the same persons, from the same hole. Afterwards, when patent was applied for, one of these records is taken and the others disclaimed. Instead of staking it out, as originally claimed, it is made to run at right angles to its original course, as the map referred to will show.

On the cross-examination of McClellan and Webster (pp. 78 and 86), there is a hopeless attempt by them to locate indefinitely on the mountain side holes that never existed, and would contradict the record if they did exist, for the record calls for the same identical spot.

In addition to this, the statute in force at that time allowed only 1,400 feet to be taken up by one location (Act of February 9th, 1866). In addition, the statutes since 1872 require $100 worth of work upon each claim each year until patented, and the uncontradicted testimony shows that from 1872 until after the issuance of the patent in 1882 the ground was never touched by the Cayuga parties. Or if it be said that we were in the adverse possession thereof, the same law which requires annual labor should not allow of such neglect that ten annual periods should pass without at least demand for possession.

IX.

Bona Fide Purchasers.

From November, 1879, to January, 1880, were the negotiations which passed this title to the Colorado Central Consolidated Mining Company. The consideration paid by Turnbull was about $175,000, and by the Colorado Central Consolidated Mining Company $400,000. The sale was for cash from the Marshall Company to Turnbull, and for cash from Turnbull to the new company. There can be no honest pretence from the evidence, of a reorganization of the Marshall Co. Hall, who had been a director in the Marshall Company, states that he owned but one share of its stock, and took no active part in its management.

The doctrine of innocent purchasers for value applies as fully in cases where the United States is only a nominal party as in any other case.

The ground of exercising equity jurisdiction for the vacating of a patent by the United States is precisely the same as that which would justify a private individual in breaking and setting aside his own solemn act (*U. S.* vs. *White*, 17 Fed., 561). It must be either upon the ground of fraud or of glaring mistake of fact. The Government cannot set aside its own acts for the mistake of law of its own officials. There is no fraud in this case. What is proved at most is a mere irregularity, for which, as a basis, no private contract would be set aside as between the parties themselves, much less as between the vendor and innocent third parties. If this patent can be set aside on the grounds herein mentioned, all patents issued under the mineral laws are at sea, because any mistake in the procedure, however innocently made, can, at the instance of adverse claimants who are disappointed in a contest before the Land Office, either local or at Washington, move the Attorney-General of the United States to vacate.

X.

No alleged lesion involves the entire patent.

In no sense and in no manner can a bill be maintained under the existing authorities as to the whole patent, even if the United States can maintain such an action for the benefit of the Cayuga claimants, when the Cayuga claimants are entitled to but a part of the ground thus covered; and whatever irregularity existed only affected such part.

XI.

To support a rescission there must be a tender preliminarily.

This case necessarily involves a rescission. In every rescission there must be a tender placing the parties in *statu quo*. This applies to suits by the United States. This point was not made specifically in the demurrer below, but we submit that a general demurrer in a case of rescission, where the bill showed no tender or excuse therefor, would be sufficient to show no equity in the bill (*U. S.* vs. *White*, 17 Fed., 561).

XII.

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED, AND APPEAL DISMISSED.

R. S. MORRISON,
SIMON STERNE,
Solicitors and of Counsel for Appellees.

Supreme Court of the United States,

OCTOBER TERM, 1888.

UNITED STATES, Appellant, *vs.* THE MARSHALL SILVER MINING COMPANY and the Colorado Central Consolidated Mining Company, Appellees.	No. 204.

SEPARATE BRIEF ON BEHALF OF THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY.

Statement.

The patent sought to be set aside by the United States in this action was granted on the 8th day of June, 1874. The Colorado Central Consolidated Mining Company was organized under the laws of the State of New York in December, 1879, and purchased the property, which included Tunnel Lode No. 5, Mineral Survey Lot No. 247, from one Turnbull, together with other property purchased from the owners of the Colorado Central Lode, and paid therefor, through trustees, $400,000 and upwards in cash. When they made the purchase there was nothing of record which would put them upon notice as to any existing prior right on the part of any person. They had a right to rely, and did rely, upon the patent of the United States, and were

not bound to inquire or to examine whether the law was in all respects complied with as to the steps taken by claimants and Government agents, which culminated in the issue of such patent. The act of the Government of the United States in issuing the patent was conclusive that all such steps were regularly taken, and the defendant, the Colorado Central Consolidated Mining Company, did rely and had a right to rely upon the solemn act of the Government in issuing this patent, and that its own officers did their duty. It was, therefore, a purchaser without notice of any prior claim in relation to this ground through mesne conveyances from the Government of the United States, acting in good faith and without any notice or pretense of notice, as the record shows, of the claims made by the Cayuga claimants. The patent to the Cayuga claimants was not issued until more than two years had elapsed after the purchase by the Colorado Central Consolidated Mining Company, and for three years after they admit notice of the issue of the patent sought to be set aside, the claimants of the Cayuga Lode stand idly by and allow us to make vast expenditures in developing the property. The deeds to the Colorado Central Consolidated Mining Company were recorded immediately after the purchase was made by it in January, 1880 (page 223), and its transaction was fully completed.

POINTS.

I.

A *bona fide* purchaser for value of property patented by the United States who takes the same without notice of any fraud or mistake in relation to the issuance of said patent, is not affected by any such fraud or mistake, and the Government of the United States cannot divest it of title.

Colorado Coal and Iron Co. vs. *U. S.*, 123 U. S., 307.

II.

If this action were brought by the claimants of the Cayuga against the Colorado Central Consolidated Mining Company by way of ejectment they would be held estopped by their own *laches* from asserting their title against

the Colorado Central Consolidated Mining Company, inasmuch as the property in question had been for at least ten years in the undisturbed possession of its vendors the Marshall Silver Mining Company, had been operated as a mine by it, had been perfected by patent, and during the whole of the said period of time, or at any time prior to the purchase by the said Colorado Central Consolidated Mining Company of the property in question, and subsequent to the issuance of the patent by the United States Government, the claimants of the Cayuga commenced no action nor asserted any claim thereto, which would have served as notice, and thereby have prevented the purchase of Tunnel Lode No. 5 by the Colorado Central Consolidated Mining Company. The Cayuga claimants and the United States in their behalf are therefore estopped by *laches* from asserting a title to the detriment of the Colorado Central Consolidated Mining Company at this late day.

Cincinnati *vs.* White, 6 Pet., 431.
Bank *vs.* Hazard, 30 N. Y., 226.
Elmendorf *vs.* Taylor, 10 Wheat., 152.
Piatt *vs.* Vattier, 9 Peters, 405.
Kennedy *vs.* Georgia State Bank, 8 How., 586.
Godden *vs.* Kimmell, 99 U. S., 201.

III.

The Government of the United States has no such interest in this action as justifies it in bringing the same; and the bill was therefore properly dismissed.

U. S. *vs.* San Jacinto Tin Co., 125 U. S., 273.
U. S. *vs.* Beebe, 127 U. S., 338.

IV.

The judgment of the Court below should be affirmed, with costs.

SIMON STERNE,
Solicitor, and of Counsel for the Colorado Central Consolidated Mining Company, Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES *vs.* THE MARSHALL SILVER MINING Company and The Colorado Central Consolidated Mining Company.	No. 17.

STATEMENT OF THE ATTORNEY-GENERAL.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES *vs.* THE MARSHALL SILVER MINING Company and The Colorado Central Consolidated Mining Company.	No. 17.

STATEMENT OF THE ATTORNEY-GENERAL.

And now comes the Attorney-General of the United States and gives the court to be informed that the United States has no interest in the subject-matter of this suit, and the controversy involved therein is one between private parties only; but the Attorney-General makes no objection to the prosecution of this appeal in the name of the United States by the parties in whose interest it was taken, if, in the opinion of the court, the United States was under an obligation to such parties to bring this suit, or is under an obligation to them to prosecute this appeal.

9727

LETTER OF COMMISSIONER OF THE LAND OFFICE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 17, 1888.

Hon. WILLIAM F. VILAS,
Secretary of the Interior:

SIR: In the matter of the inquiry made in letter of the 15th instant from the honorable Attorney-General whether the United States have any substantial interest in the matter involved in the case of *The United States* v. *The Marshall Silver Mining Company and The Colorado Central Consolidated Mining Company*, I have the honor to submit the following report in compliance with your instructions indorsed on said Attorney-General's letter, which was received by your reference of the 16th instant.

Patent for the Tunnel No. 5 lode claim, Central City, Colo., mineral entry No. 358, was erroneously issued June 8, 1874, and included the ground in conflict with the survey of the Cayuga lode claim.

Patent for the Cayuga lode claim, Central City, Colo., mineral entry No. 1728, was issued January 31, 1882, and also included said ground in conflict.

The ground in conflict rightly belongs to the Cayuga claimants, and is fully covered by their said patent.

The Government has no pecuniary interest in the ground in controversy.

It is believed, however (see report to your office in the case dated February 3, 1883), that the Department is under obligation to inquire into the matter and see that the Cayuga claimants have a patent clear from interference

and unclouded with controversy arising through official acts.

The Attorney-General's letter of the 15th instant is herewith returned. Letter from same referred to this office by you on the 8th instant, if received has been mislaid.

Very respectfully,

S. M. STOCKSLAGER,
Acting Commissioner.

Office Supreme Court U. S.
FILED.
OCT 15 1888.
JAMES H. MCKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

UNITED STATES, APPELLANT,

v.

THE MARSHALL SILVER MINING COMPANY AND THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, APPELLEES.

No. 17.

Motion to Dismiss Appeal.

The appellees move to dismiss this appeal on the ground that the United States has, through its law officer, declared to this Court that it has no interest in the controversy.

And that it rested under no obligation to commence the action and is not now under any obligation to prosecute this appeal.

STATEMENT.

In 1865 the Square and Compass lode was located and became (700 out of 800 feet) the property of the Marshall Silver Mining Company. In 1867 the Cayuga lode was located, in the interest of which this action is brought. In 1871 the Tunnel No. 5 lode was located and became the property of said Marshall Company.

In 1871 dispute and litigation arose between these loca-

tions which covered substantially the same ground, which resulted in the Marshall Company maintaining possession of the premises, which they kept until they sold in 1879 to the Colorado Central Consolidated Mining Company, the co-defendant herein.

In 1872 both the Cayuga claimants and the Marshall Company made applications within the same month and within a few days of each other for survey; the Marshall Company making the later application.

The Cayuga application was adversed by the No. 5 lode and suit brought to support the adverse claim within the time prescribed by law. But before any trial could be had, Rist, one of the co-owners on the Cayuga, withdrew his name from the application, whereupon the Local Land Office and Surveyor-General cancelled the Cayuga survey and application under the practice and precedents of the Land Office practice then prevailing and mailed notice thereof to the remaining Cayuga applicants, who, however, deny receiving such notice.

The Marshall Silver Mining Company thereupon and after such cancellation amended its survey, taking in so much of the Cayuga claim as had before been excluded from its No. 5 survey.

The Register of the Land Office, upon whom rests the duty of advertising, made no amendment of the advertisement, the exterior lines of the Marshall Company's claim remaining as theretofore notwithstanding the cancellation of the Cayuga survey, the only difference being in the claim for superficial acreage. There being no longer an application on the Cayuga to contest, the Marshall Company discontinued its action, remaining in undisturbed possession of the ground. Whether or not the Cayuga claimants, who lived within two miles of this ground during the whole of the time, received the notice which the

Register says he sent, it is a fact conceded that from 1871 until the present time the Cayuga claimants never were in possession, and never sought the possession of the ground in controversy, and have done no work upon that ground from that time to this. The application for patent was abandoned by the Cayuga claimants in 1873. No further effort was made by them to procure a patent until long after the patent had been issued to the Marshall Silver Mining Company, and not until about two years after the property patented to the Marshall Company had become by purchase the property of said Colorado Central Company.

On June 2, 1873, the Marshall Company completed its entry at the local office by payment, and patent issued to it on June 8, 1874. For six years succeeding the issue of the patent the Marshall Company operated and developed the property, and in December, 1879, sold Tunnel Lode No. 5, together with other property, to the Colorado Central Company for $400,000. In the interval betwen 1874 and 1880 the whole of the ground originally claimed by the Cayuga, except about $\frac{2}{10}$ of one acre, was patented to different claimants in various parcels, the Cayuga claim being, during the whole of that period, standing on the official surveys as a cancelled claim.

The deed of the Marshall Company for the No. 5 Lode to Geo. Turnbull was made Nov. 17, 1879; the deed of Geo. Turnbull to the Colorado Central Company was made December 15, 1879, and both deeds were recorded in the Recorder's Office in Georgetown, where one of these claimants resided, in January, 1880. On November 30, 1881, the Cayuga Lode was entered for patent at the Local Land Office on their survey which had stood cancelled on the records for over eight years; their patent followed on January 31, 1882, and in March, 1883, this action was

commenced by the United States against said Marshall and Colorado Central Companies to vacate the patent of Tunnel Lode No. 5, for alleged fraud and irregularity. No payment was made to the United States Government by the Cayuga claimants until the entry for patent in November, 1881, more than seven years after the issue of the patent to the Marshall Silver Mining Company in 1874, and two years after the conveyance to the Colorado Central Company. All of which conveyances and the No. 5 patent were recorded in Clear Creek County, Colorado, long before patent issued to the Cayuga Company and long before the commencement of the action.

Points.

1. The United States have no interest in the subject-matter of the controversy.

2. The United States allows its name to be used in a controversy wholly between individuals.

3. The United States are under no obligation to perfect the title of Webster *et al.* as against the title of the prior patentee of the same premises, and the bill does not alledge any such facts as would imply such relation to the suit or obligation to the Cayuga claimants.

4. When the United States appear by attorney in court, and state that the case pending is one in which it has no interest, and that they do not object to a dismissal of the appeal, but at the same time suggest that the parties in interest be allowed to contest their claims on the appeal already taken by the Government, the appeal has no longer such official endorsement as should cause it to be further considered by the Court.

5. The real parties in interest are not made parties to the bill.

If the above points, or any one of them, are maintained, the bill ought to be dismissed.

In *U. S.* v. *Minor*, 114 U. S., 244, the court says:

"And it may become a grave question in some future "case of this character how far the officers of the Govern- "ment can be permitted, when it has no interest in the prop- "erty or in the subject of the litigation, to use its name to "set aside its patent for which it has received full compen- "sation, for the benefit of a rival claimant."

In *U. S.* v. *Throckmorton*, 98 U. S., 71, the court say:

"It would be a very dangerous doctrine, one threaten- "ing the title to millions of acres of land held by patent "from the Government, if any man who has a grudge or "claim against his neighbor can, by indemnifying the "Government for costs and furnishing the needed stimu- "lus to a district attorney, institute a suit in chancery in "the United States to declare the patent void. It is es- "sential, therefore, to such a suit that, without special regard "to form, but in some way which the court can recognize, "it should appear that the Attorney-General has brought "it himself or given such order for its institution as will "make him officially responsible for it, and show his con- "trol of the cause."

Both these cases are cited and approved in *U. S.* v. *San Jacinto Co.*, 125 U. S., 273, and the court use the further language:

"And if it is apparent that the suit is brought for the "benefit of some third party, and that the United States "has no pecuniary interest in the remedy sought, and is "under no obligation to the party who will be benefited "to sustain an action for his use; in short, if there does "not appear any obligation on the part of the United States "to the public, or to any individual, or any interest of its "own, it can no more sustain such an action than any "private person could under similar circumstances."

And in *United States* v. *Beebe* (127 U. S., 342), the court again recognize the fact that the Government to set aside a patent must either have an interest or be "under "an obligation respecting the relief involved:"

"If a patent is wrongfully issued to one individual "which should have been issued to another, or if two pat- "ents for the same land have been issued to two different "individuals, it may properly be left to the individuals to "settle, by personal litigation, the question of right in "which they alone are interested. But if it should come "to the knowledge of the Government that a patent has "been fraudulently obtained and that such fraudulent pat- "ent, if allowed to stand, would work prejudice to the in- "terests or rights of the United States, or would prevent "the Government from fulfilling an obligation incurred by "it, either to the public or to an individual, which per- "sonal litigation would not remedy, there would be an oc- "casion which would make it the duty of the Government "to institute judicial proceedings to vacate such patent."

It is conceded that the Government has no interest.

Is it, however, under an obligation to set aside its prior patent in favor of the junior patentee?

We maintain—

A.—That it was under no such obligation.

B.—Even if under such obligation it cannot exercise it after it has granted a second patent and parted with its entire interest.

A.—*It was under no obligation.*

The Cayuga claimants had no vested right. They had made no payment and were mere *ex parte* applicants for title who had not yet paid its price or entered into any contract binding them to take the land.

The Yosemite Case, 15 Wall.

There is no implied warranty to one who takes a second

deed with knowledge of a prior grant of the same premises.

Its obligation is confined to cases of fraud or gross irregularity clearly proved and acted on before the propery has come to a *bona fide* purchaser for value without notice or, at least, without laches.

The Maxwell Land Grant Case, 121 U. S., 380.
U. S. Southern Colorado Co., 123 U. S., 307.
U. S. v. *Throckmorton*, 98 U. S., 61.

B.—*They could not sue, having no interest, or at least must have made the real parties in interest parties to the record in some form.*

In bill to set aside patent, the equitable owners must be parties.

U. S. v. *Central Pacific R.R.*, 11 Fed., 458.

The decree, whatever it be, cannot bind the Cayuga parties. Is it then just for the Court to give a decree upon a case with such parties, that while, if against us, it would entirely cancel our title, while, if in our favor, it would not be binding against our adversaries?

SIMON STERNE,
R. S. MORRISON,
Solicitors for Appellees.

Supreme Court of the United States,

OCTOBER TERM, 1888.

THE UNITED STATES,
APPELLANT,

vs.

THE MARSHALL SILVER MINING COMPANY and THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY,
APPELLEES.

No. 17.

BRIEF FOR APPELLEES.

(No. 2.)

SIMON STERNE AND
R. S. MORRISON,
Counsel for Appellees.

NEW YORK:
DOUGLAS TAYLOR, LAW PRINTER, 89 NASSAU STREET, COR. FULTON.
1888.

Supreme Court of the United States,

OCTOBER TERM, 1888.

UNITED STATES, Appellant, *vs.* THE MARSHALL SILVER MINING COMPANY and THE COLORADO CENTRAL CONSOLIDATED MINING COMPANY, Appellees.	No. 17.

BRIEF FOR APPELLEES.

Statement.

This is an appeal from a decree of the Circuit Court of the United States for the District of Colorado, dismissing the bill of complaint herein after a hearing upon the merits. The action is one in equity to set aside a patent granted by the Government of the United States on the 8th day of June, 1874, for Tunnel Lode No. 5 known as survey lot No. 247, and issued to the Marshall Silver Mining Company nine years before the commencement of this action, which was brought in 1883, and upwards of three years after the mining property covered by the patent passed into the hands of the Colorado Central Consolidated Mining Company, the other defendant herein, which is a *bona fide* purchaser for value and without notice.

The first location made upon Leavenworth mountain, which is within two miles of Georgetown, Colorado, upon the ground in question, was that made on July 5th, 1865, by Marshall and others as owners of the Compass and Square lode (pp. 184 and 185 of Record, Exhibits; Marshall's testimony, p. 110; testimony of Frank Delmar, p. 45). From 1865 to 1867 and thenceforth the Marshall Silver Mining Company worked the lode (p. 115, testimony of Kelso). On September 28th, 1867, a location was made by the Cayuga claimants, who, however, for three years thereafter did not go upon the mountain to do any work upon the location. The location made by the Cayuga claimants was made by running from one alleged discovery shaft four claims in the shape of spokes of a wheel, in entire defiance of all mining laws and regulations, respectively named Cayuga, Seneca, Honenjoy and Camadise (see pp. 179, 180 and 181, and map facing p. 223 of Record). Indeed five claims if we count the Cayuga as located, as distinguished from the Cayuga as surveyed in 1872. This shaft, according to the weight of the testimony, contained no mineral (testimony of Kelso, p. 115; of Hurd, p. 117; Old, p. 132; Cox, pp. 106 and 107).

A conflict arose in 1871 between the owners of the Cayuga, and the Compass and Square claims as to the possession of the ground, which resulted in an effort on the part of Walter M. Webster, Erskine McClellan and nominally of Joseph Rist, being all the Cayuga claimants, to obtain an injunction against the Marshall Silver Mining Company, which was at that time the owner of the Compass and Square lode. After a hearing before Judge Belford the injunction was refused, and the preliminary restraining order on the Marshall Silver Mining Company was dissolved by order on November 28th, 1871. The Marshall Silver Mining Company thereupon kept possession of the ground and continued to work it (testimony of Marshall, pp. 111 and 182). Prior to this time Joseph Rist, one of the owners, demanded the dismissal of the

complaint on the ground that the action was commenced without his authority or consent. Subsequently, and ten months after the injunction order was refused to the Cayuga claimants, to wit, on August 27th, 1872, Messrs. Johnson and Teller, as solicitors for the complainants, Webster and McClellan, dismissed the bill of complaint and discontinued the injunction action (pp. 182 and 183). From that time forth McClellan and Webster the Cayuga claimants abandoned the working of whatever claim they had upon Leavenworth mountain, made no demand and no effort to work the same, and failed wholly and utterly to comply with the requirements of law in regard to performing an annual amount of work ($100) to justify the issuance of a patent to them even where there is no conflict (testimony of Robeson, p. 133; Hall, p. 106).

During the whole of this time, from 1871 to 1883, both Webster and McClellan lived in the Town of Georgetown, Clear Creek County, which is within two miles of the Cayuga location, and of Tunnel Lode No. 5 and the Compass and Square Lodes, except that during a short interval McClellan lived in Central City, which is about eighteen miles from Georgetown (p. 34 of Record).

In 1872, and whilst in possession of the Compass and Square Lode, the Marshall Silver Mining Company was locating at a considerable distance under the surface of the ground of the Compass and Square claim various tunnel lodes, and among others located on March 13th, 1871, Tunnel Lode No. 5 (Mineral Survey Lot No. 247), the patent for which is sought to be set aside herein, and which, upon the surface of the ground, took up the more valuable portion of the Compass and Square Lode.

The Marshall Silver Mining Company thereupon proceeded in due form to obtain a patent for Tunnel Lode No. 5, which was in its possession, as well as of the surface part of the ground, which it had held under the possessory title of the Compass and Square Lode. The application for patent of Tunnel Lode No. 5 was filed December 14th, 1872,

by the Marshall Silver Mining Company. On the same day the Cayuga claimants likewise made an application for the patenting of the Cayuga Lode, which had theretofore been abandoned by them. A survey of the Cayuga claim was ordered November 20th, 1872, and approved December 5th, 1872.

The Cayuga survey, made under the application to the Surveyor-General for survey in 1872, ran at right angles with the Cayuga claim as made by the discovery notice of 1867, and does not agree with any of the four lodes located from the same shaft as part of the Cayuga discovery (see testimony of La Neve E. Foster, p. 135; Exhibit, p. 181, &c.).

The survey under the Marshall Silver Mining Company's entry (claimants of Tunnel Lode No. 5) was ordered on December 6th, 1872, and returned approved December 10th, 1872. The claims of both parties were advertised by the Receiver in conformity with law, and within the time required by law the Marshall Silver Mining Company filed in the Land Office an adverse claim, alleging title and possessory rights to all that part of the ground claimed by the Cayuga claimants, and did also within the time required by law commence an action of ejectment against the Cayuga claimants for the possession of the premises.

In March, 1873, whilst this contest in the local Land Office was pending and this action of ejectment was being prosecuted between the litigants, Rist, one of the Cayuga claimants, authorized Butler, his attorney, to withdraw his claim for patent on the Cayuga claim, after becoming satisfied that he could not prevail, and without any payment to him or to his attorney by, or of any influence of any kind from, the Marshall Silver Mining Company to induce this action on his part (testimony of Butler, p. 30; Exhibits, pp. 146 and 153). Such withdrawal was filed in the local Land Office. At that time it was the practice of the local Land Office at Central City that if any one of several joint owners declined to pursue an application to patent, the

survey was thereupon cancelled, and so marked in all the records of the local Land Office and in the general records of the Surveyor-General's office (testimony of Arnold, p. 121), and the application for patent annulled, and notice thereof sent to the applicants (see testimony of Marshall, p. 113; William A. Arnold, who was then Receiver, p. 120).

Actual notice in writing was thereupon given by Arnold, the Receiver, and Lathrop, the Register of the local land office, to McClellan and Webster on April 30th, 1873, that their application for patent had been vacated, and that there was no application then pending in the office for the Cayuga lode; Webster and McClellan were given the usual time to appeal (Record, p. 119, testimony of Arnold; and copy of letter, page 150). The letter is dated April 30th, 1873. That this notice was given in conformity with the usual practice of the office at that time is testified to by Mr. Arnold, the Receiver, and that this practice was the usual one and had been at one time applied to the disadvantage of the Marshall Silver Mining Company is also shown by the fact that when Mr. Marshall applied as President of the Marshall Silver Mining Company to obtain a patent for the Compass and Square lodes, he was denied the privilege of proceeding with his application, and the same was not entertained in consequence of the non-acquiescence of Mr. Turck, one of the co-owners (p. 120). The evidence is direct and positive that this letter was sent to McClellan and Webster in due course under an official envelope; and the statement is made by Arnold (p. 118) that he knows that McClellan received the letter. In addition to this notice there was actual verbal notice given, and the Cayuga claimants are charged with constructive notice by notice to their attorney Bradford and the record in their own proceedings. Marshall gave notice to Bradford that the Marshall Silver Mining Company was going to patent on the ground in part claimed by the Cayuga early in 1874 (p. 112). That Bradford was the attorney for McClellan and Webster in 1874 is shown by McClellan's own testimony (p. 35).

During the whole of that time (1873 to 1882) McClellan admits that he knew that the Marshall Silver Mining Company was working the mine, and that the Colorado Central Consolidated Mining Company, as a purchaser, had acquired title thereto and was working it (see McClellan's answer at bottom of page 34); and also that Bradford was his attorney. As to actual verbal notice in addition to the official letter Bruné says distinctly that he gave McClellan notice of the cancellation of the Cayuga survey and the withdrawal of the application for patent of the Cayuga lode (pp. 95 and 97). Bruné says in terms that he gave McClellan notice in the Spring of 1873 on the street in Georgetown of the withdrawal by Rist and the action of the local land office, and that the reason he informed McClellan at that time was because he had business relations with him in reference to the survey of the Cayuga lode and thought it might interest him, and therefore informed him of the proceedings as to the Cayuga lode in the Land Office at Central City.

On May 12, 1873, notice was given in due form to Lessing, who was the Surveyor-General of the Territory, by Lathrop, Register, and Arnold, Receiver, that the survey of the Cayuga Lode, which had been approved in his office, was vacated and cancelled, and that in the opinion of the Register and Receiver the whole application for patent was thereby vacated, and that notice thereof had been sent to the Cayuga owners (Exhibit, p. 187). Their application and survey were thereupon actually cancelled by the local Land Office and by the Surveyor-General at Denver.

An application was thereupon made by the Marshall Silver Mining Company for an amendment of the survey of Tunnel Lode No. 5. After the time for McClellan and Webster to appeal from the action of the office had expired without any action by them, an amended survey was made, and an amended plat was filed, and amended field notes were made. And upon these papers so amended the Marshall Silver Mining Company, owners of Tunnel

Lode No. 5, made entry, and prosecuted its application for patent before the General Land Office (pp. 185, 186, 187 and 188). All these steps were taken in conformity with the usual practice of the local Land Office then prevailing (see page 96). An amended survey of Tunnel Lode No. 5 was thereupon made, which included an area of ground which had (within the same outward boundaries, however) been theretofore excluded by reason of the claim which had interfered with it, but which by that time had been cancelled and was as though it had never been made. All these proceedings were also in conformity with usual practice (p. 96). The resurvey shows that the amended plan of the Marshall Tunnel Lode No. 5 contained the same exterior boundaries as the other lode, simply including within such exterior boundaries so much of the acreage of the Cayuga Lode as had theretofore been supposed to be in conflict with it. The amended survey does not appear to have been re-advertised by the Register. Under the regulations, and the law of 1872, it was made the Register's duty to advertise the survey, and the law does not require amendments of surveys to be advertised. But inasmuch as the whole ground had been already surveyed and advertised by the Register, both on behalf of the Cayuga claimants and on behalf of the Marshall Silver Mining Company, and as no change was made in the boundary or outside lines of the Marshall Silver Mining Company by the re-survey and amendment, the Register probably deemed, if he failed to re-advertise, that there was no occasion for any such re-advertisement, particularly as the only parties claiming to have any interest in such advertisement could be the Cayuga claimants only, who had withdrawn all application through one of them, notice of which withdrawal and the consequence of which, according to the opinion of the local Land Office in annulling the application and survey of the Cayuga claimants, had been given to the claimants, and the time to appeal from which had been permitted to expire without any action by them: the contested ground was therefore deemed by every party

to have been abandoned by McClellan and Webster as to claim of title, as it had been since 1871, and ever thereafter, abandoned by them as to possession. No entry was made nor money tendered for entry by the Cayuga claimants until nine years after all this transpired. Indeed this abandonment is more particularly emphasized by the fact that the ejectment proceedings in the District Court of Clear Creek County to test title were not moved by the defendants during the whole year 1873 and were discontinued January 30th, 1874, by the plaintiffs without any resistance on the part of the defendants (p. 156).

That amendments were allowed on applications for patents of lodes and as thus amended that patents were in fact issued for property which included part of the Cayuga ground, and that applications were cancelled habitually by the Surveyor-General and by the local Land Office is fully shown by the testimony of Arnold, the Receiver (p. 125), and that the amended survey was duly forwarded to Washington in conformity with the application is also shown in the testimony of Arnold (p. 125); and also that the Cayuga claim was regarded as non-existent by the local Land Office and the Surveyor-General's office from May 12th, 1873, to November 30th, 1881, is also amply shown on the plat sheets of both offices (p. 126, Arnold's testimony).

It appears by careful measurements of the stakes on the ground of the Cayuga claim, as surveyed for patent, as compared with the stakes on the ground described in the patent actually issued in 1874 to the Marshall Silver Mining Company, that all the ground which the Cayuga people could claim affects but from one-tenth to one-eighth of an acre of the tunnel claim No. 5 (testimony La Neve E. Foster, p. 103; testimony of Chase, p. 107, and Exhibit 1 of defendant's testimony; also map facing p. 223). The claim made in the original location of the Marshall Silver Mining Company is forty-five one hundredths of an acre, and the patent as issued is for one and

nine-tenths of an acre. The greater part of this discrepancy arose from an improper survey of the ground claimed by the Cayuga claimants. A re-survey of the ground as actually located shows that the interference of the Cayuga claim with the Marshall tunnel ground was but from one-tenth to one-eighth of an acre of the area of the latter (see pp. 103 and 107).

All these papers referred to, and affecting the interest of Webster and McClellan are, and have been since 1873 of record in the local Land Office at Central City and at the Surveyor-General's Office at Denver, Colorado, showing that both at the local Land Office and at the Surveyor-General's Office the claim for patent and the survey of the Cayuga claim had been cancelled from 1873 to 1883 and the reason therefor. All the necessary papers for the purpose of entitling the Marshall Silver Mining Company to patent were forwarded to the General Land Office in 1873 and remained there in due course for a year until reached. These papers show on their face that there had been an amended survey and just what such amendment affected. There was no concealment from the Government in reference to the matter of any kind whatever. The plat of the original survey was forwarded; the amended survey was forwarded (Record, p. 59); the payment shows that the acreage so claimed and purchased was larger than $\frac{45}{100}$ of an acre; the papers before the General Land Office exhibited that the original number, 231, which is the Cayuga claim, was excluded from Tunnel Lode No. 5; that the application was for $1\frac{9}{10}$ of an acre; that the final plat was so amended; that any discrepancy which existed between the original entry as to the acreage and the final entry as made arose from including ground which the Cayuga was supposed to have claimed previously, such discrepancy and the cause was fully made known to the Land Department at Washington by the papers there filed before issue of patent (Tyssowski's testimony, pp. 58–69), and

there was, therefore, no suppression of any kind of any fact important to be known by the General Land Office, much less any fraud of any kind. There was nothing which even accidently could have misled the Department at Washington. This is fully shown on pages 58, 59 and 60 and 66 of the testimony of Tyssowski. The testimony of Tyssowski, which was taken to prove that the issuance of the patent to Tunnel Lode No. 5, was not in conformity with the practice of the department, is as to that point of no value, inasmuch as he himself confesses that it was not until after all these proceedings had been conducted that he commenced to have any information in relation to mineral patents, and that it was not until 1876 that he became familiar enough to be considered an expert, and that he did not know the usages and customs with reference to mining laws and regulations anterior to those dates. Surely if there was any irregularity with reference to the issuance of patent for Tunnel Lode No. 5, any such irregularity existed to a still greater degree, as against the Cayuga patent of 1881, which was issued without any notice in conformity with law, without readvertisement, without compliance with the law requiring continuous possession and work of $100 per year being done upon it, and without notice to conflicting claimants (testimony of Tyssowski, pp. 63 and 64).

Not the slightest evidence of any kind or nature, impugning the good faith of the Register, Receiver, Surveyor-General, or of the Marshall Silver Mining Company, or its vendees, or of any other person connected with the transaction was offered or produced in the court below in relation to any of these transactions, nor was the slightest effort made or evidence produced to support in any one particular the charge of fraud made in the bill.

A patent in due course was issued to the Marshall Company in June, 1874, for Tunnel Lode No. 5, known as survey lot No. 247, and it was not alone Tunnel Lode No. 5 which was patented upon the ground to which the

Cayuga claimants survey extended, but at the time of the trial of this action, twelve entries for patent, other than Tunnel Lode No. 5, had been made, of which six had been patented and six others were in process of being issued between 1874 and 1883, by the Government, the interest of the owners of all of which will be disturbed and affected by the judgment in this case should it be adverse to the defendants (testimony of Cox, pp. 103, 104, giving list; testimony of Chase, pp. 108, 109, and map facing page 223). Not one of these parties owning or leasing these twelve other claims is a party to the record herein.

After the patent was issued and during the time that the ground was in the possession of the Marshall Silver Mining Company, from $25,000 to $50,000 was expended by it in development work down to 1879 (p. 101), then the property passed from the possession of the Marshall Silver Mining Company to Turnbull, and from Turnbull to the Colorado Central Consolidated Mining Company, who were both *bona fide* purchasers for value, without notice of any defect whatever in the title of Tunnel Lode No. 5, or of any assertion of title on the part of the Cayuga claimants. Even Webster admits that no work was done on the Cayuga mine by him or McClellan during the whole of the eight years prior to the time of the trial (testimony of Webster, p. 32).

From 1873 to 1880 no claim of title was made, no notice was given of any such claim, no work was done upon Leavenworth Mountain by the claimants of the Cayuga mine, notwithstanding the fact that they knew that the Marshall Silver Mining Company was in possession and that many others were in possession and actively working the ground (testimony of Hall, pp. 100 and 101). And thereafter when the property passed by purchase into the hands of the Colorado Central Consolidated Mining Company in December, 1879, and actively worked by it, no claim was made, although these claimants resided within two miles of the location of the mine,

and they must have known, as a matter of public notoriety, that this property, which they believed to be so valuable, was passing into the hands of another company in 1879, and must also have been aware of this fact from an enquiry as to the status of their own proceeding, the records of the deeds of the Marshall Silver Mining Company to Turnbull, and of the deeds of Turnbull to the Colorado Central Consolidated Mining Company, which were duly recorded in Georgetown, in Clear Creek County, in the town and county where the Cayuga claimants themselves were residents. These deeds are dated November 17th, 1879, and December 15th, 1879, and recorded January 6th, 1880, and January 15th, 1880, respectively. The consideration paid for all the property conveyed by Turnbull to the Colorado Central Consolidated Mining Company was $400,000, which included patent for Tunnel Lode No. 5 as well as other property. The consideration was paid wholly in money. Mr. Hall, when he mentioned that he took stock for some of his interest in the property that was conveyed, his interest being wholly in the Colorado Central vein also, means thereby simply that he subscribed for stock of the Colorado Central Consolidated Mining Company and paid for it. The transaction as detailed by him shows that the whole of the money was paid in cash; he with others interested in the receipt of the purchase money, amounting in all to $400,000, subscribed to the extent of $100,000 to the capital stock of the Colorado Central Consolidated Mining Company. Thus $300,000 of the moneys were subscribed by persons other than those who were interested in obtaining the purchase money, all of which went to pay for this property in controversy together with other property.

The testimony is uncontradicted, conclusive and overwhelming that the Colorado Central Consolidated Mining Company exercised all proper caution in the purchase and relied upon the patent issued by the Government of the United States, and had no knowledge, information or sug-

gestion, and could not have had any, that Webster and McClelland made any claim of any kind whatever to any part of the property embraced in Tunnel Lode No. 5, or that they at any time made any such claim, and the Colorado Central Consolidated Mining Company was in every respect a *bona fide* purchaser for value without notice (see testimony of Hall, pp. 69, 70, 99 and 101; testimony of Turnbull, pp. 91, 93, and of Baltzer, Lichtenstein, Dodge, Guion and Classon, pp. 224 to 233).

The suggestion made in the brief of the appellants that the Colorado Central Consolidated Mining Company was a reorganization of the Marshall Silver Mining Company is utterly without foundation, there not being a particle of evidence to that effect. Indeed, the evidence is wholly the other way. The Colorado Central Consolidated Mining Company bought the property of the Marshall Silver Mining Company, also, and in greater part, property which never belonged to the Marshall Silver Mining Company, and never exchanged a single one of its shares for the shares of the Marshall Silver Mining Company, but paid $400,000 cash for the whole property and had no privity or connection whatever with the Marshall Silver Mining Company stockholders or its officers, except as vendees of part of its property from the latter corporation, and the case is utterly devoid of any evidence supporting that assertion in the appellant's brief.

Two years after this transfer to the Colorado Central Consolidated Mining Company of this property, and eleven years after the abandonment of work and claim of title thereto by McClellan and Webster and without any readvertisement by them of any kind, and upon their old cancelled survey and application, and eight years after the issuance of the patent to the Marshall Silver Mining Company to Tunnel Lode No. 5, McClellan and Webster, in 1881, were permitted at the local land office to make an entry upon this cancelled survey. The papers were transmitted to Washington, and within two months thereafter, in

January, 1882, a patent was issued (without notice to any interest affected thereby) to the Cayuga claimants, for the ground as surveyed in December, 1872. In 1883 this action was commenced by the United States against the Marshall Silver Mining Company and its vendees, the Colorado Central Consolidated Company, to set aside the patent to tunnel lode No. 5 on the ground of fraud by the Marshall Silver Mining Company in obtaining the same. In this action on the trial on the merits the United States was defeated; and now since this appeal has been taken, and at this term of this Court, the United States, by its attorney-General, has come into court and declared that it had no interest in the subject-matter of this suit, and that the controversy involved therein is one between private parties only, therefore the only party which seeks equitable redress herein on the ground of fraud abandons the case and withdraws therefrom.

POINTS.

I.

The Supreme Court will not entertain an appeal prosecuted, or attempted to be prosecuted, by or on behalf of persons not parties to the record.

This is the point decided in the case of

Guion vs. *Liverpool, London & Globe Ins. Co.*, 109 U. S. 173;

wherein the doctrine is declared that a person not a party to the decree from which the appeal is taken, cannot become a party for the purpose of the appeal, or prosecute the appeal, or have the same prosecuted on his account.

See also

Ex parte Cutting, 94 U. S., 14.

In both these cases it is held that the Court will not permit a person to intervene and become a party to the suit (not having been a party below), for the purpose of the appeal. Much more may it be argued that the Court will not entertain an appeal in such a case as the one at bar, after the appellant of record has formally announced that it has no interest in the appeal.

To the same effect is

Ex parte Cockcroft, 104 U. S., 578.

II.

Inasmuch as on the merits there was no substantial interest in the United States the bill was properly dismissed in the Circuit Court upon that ground alone.

1. The United States have no interest in this controversy, having already in open court so declared and having already patented the land to both sets of claimants.

If this Court set aside the No. 5 patent they cannot declare the United States to be the owners of the ground, because by the bill the United States says that it has already conveyed it to another. The result, then, is a decree in favor of the United States for the use of other parties who are not parties to the bill, and for whose benefit the United States is not competent to sue.

2. The United States merely allows its name to be used in a controversy wholly between individuals, as now appears by the disclaimer of record by the Attorney-General.

3. The United States are under no obligation to perfect the title of Webster *et al.* as against the title of the prior patentee of the same premises, and the bill does not allege any such facts as would imply such relation to the suit or obligation to the Cayuga claimants.

4. When the United States appear by attorney in court, and state that the case pending is one in which it has no interest, and that they do not object to a dismissal of the appeal, but at the same time suggest that the parties in interest be allowed to contest their claims on the appeal already taken by the Government, the appeal has no longer such official endorsement as should cause it to be further considered by the Court.

5. The real parties in interest are not made parties to the bill.

If the above points, or any one of them, are maintained, the decree should be affirmed.

In *United States* vs. *Minor*, 114 U. S., 233, 244, the Court say:—

"And it may become a grave question, in some future "case of this character, how far the officers of the Govern- "ment can be permitted, when it has no interest in the "property or in the subject of the litigation, to use its "name to set aside its own patent, for which it has received "full compensation for the benefit of a rival claimant."

In *United States* vs. *Throckmorton*, 98 U. S., 61, 71, the Court say:—

"It would be a very dangerous doctrine, one threaten- "ing the title to millions of acres of land held by patent "from the Government, if any man who has a grudge "or a claim against his neighbor can, by indemnifying the "Government for costs, and furnishing the needed stimu- "lus to a district attorney, institute a suit in chancery in "the United States to declare the patent void. It is essen- "tial, therefore, to such a suit, that without special regard "to form, but in some way which the Court can recognize, "it should appear that the Attorney-General has brought "it himself, or given such order for its institution as will "make him officially responsible for it, and show his con- "trol of the cause."

Both these cases are cited and approved in *United States* vs. *San Jacinto Tin Co.*, 125 U. S., 273, 281, 282, 286, and the Court use the further language:—

"And if it is apparent that the suit is brought for the "benefit of some third party, and that the United States

"has no pecuniary interest in the remedy sought, and is "under no obligation to the party who will be benefited to "sustain an action for his use; in short, if there does not "appear any obligation on the part of the United States to "the public, or to any individual, or any interest of its "own, it can no more sustain such an action than any "private person could under similar circumstances."

And in *United States* vs. *Beebe*, 127 U. S., 338, 342, the Court again recognize the fact that the Government to set aside a patent must either have an interest or be "under "an obligation respecting the relief involved:"—

"If a patent is wrongfully issued to one individual "which should have been issued to another, or if two pat- "ents for the same land have been issued to two different "individuals, it may properly be left to the individuals to "settle, by personal litigation, the question of right in "which they alone are interested. But if it should come "to the knowledge of the Government that a patent has "been fraudulently obtained, and that such fraudulent pat- "ent, if allowed to stand, would work prejudice to the in- "terests or rights of the United States, or would prevent "the Government from fulfilling an obligation incurred by "it, either to the public or to an individual, which per- "sonal litigation could not remedy, there would be an oc- "casion which would make it the duty of the Government "to institute judicial proceedings to vacate such patent."

It is conceded of record that the Government has no interest.

Is it, however, under an obligation to set aside its prior patent in favor of the junior patentee?

We maintain—

(*a.*) That it was under no such obligation.

(*b.*) Even if under such obligation it cannot exercise it after it has granted a second patent and parted with its entire interest.

(*a*). *It was under no obligation.*

The Cayuga claimants had no vested right. They had made no payment and were mere *ex parte* applicants for title who had not yet paid its price or entered into any contract binding them to take the land.

The Yosemite Valley Case, 15 Wall., 77.

There is no implied warranty to one who takes a second deed with knowledge of a prior grant of the same premises.

Its obligation is confined to cases of fraud or gross irregularity clearly proved and acted on before the property has come to a *bona fide* purchaser for value without notice, or, at least, without laches.

The Maxwell Land-Grant Case, 121 U. S., 325, 380.

Colorado Coal and Iron Company vs *The United States*, 123 U. S., 307.

United States vs. *Throckmorton*, 98 U. S., 61.

There can be no obligation upon the Government to do a vain thing in favor of the Cayuga claimants. It is to be assumed that the Government knew what has been established by the evidence, and was of record, namely, that title had passed to the Colorado Central Consolidated Mining Company; that that company had, by the transfer of December 15th, 1879, become a *bona fide* purchaser for value and without notice, and that neither the Cayuga claim nor an action by the United States could prevail as against the title of the Colorado Central Consolidated Mining Company, even though fraud had been proved on the part of the patentee.

Colorado Coal & Iron Co. vs. *United States*, 123 U. S., 307.

(*b.*) *They could not sue, having no interest, or at least, must have made the real parties in interest parties to the record in some form.*

In the bill to set aside a patent, the equitable owners must be parties.

United States vs. *Central Pacific RR.*, 11 Fed. Rep., 449, 458.

The decree, whatever it be, cannot bind the Cayuga parties. Is it, then, just for the Court to give a decree upon a case with such parties, that while, if against us, it would entirely cancel our title, and, if in our favor, it would not be binding against our adversaries?

III.

The decree of the Court below in this case should be affirmed, because the appeal is not formally within the rules of practice upon which the Court insists.

The case was tried on its merits and there are no findings of fact or law except the decree dismissing the complaint and no exceptions to rulings or decision, and no specifications of error on the record.

Rev. Stat. of the U. S., Sec. 698.
Rev. Stat. of the U. S., Sec. 750.

"There shall be annexed to and returned with any "writ of error for the removal of a cause, at the day and "place therein mentioned, an authenticated transcript of "the record, *an assignment of errors*, and a prayer for "reversal, with a citation to the adverse party."

Rev. Stat. of the U. S., Sec. 997.

"*Appeals from the Circuit Courts and District Courts* "*acting as Circuit Courts, and from District Courts in*

"*prize causes, shall be subject to the same rules, regula-*
"*tions and restrictions as are or may be prescribed in*
"*law in cases of writs of error.*"

Rev. Stat. of the U. S., Sec. 1012.

By the Judiciary Act the manner in which appeals in equity may be prosecuted, and the form in which the issues to be reviewed shall be brought to the attention of the Appellate Court, are set forth in the preceding sections with particularity, and the Court has shown an inclination to hold parties to a reasonably strict conformity to these rules in respect of the manner in which appeals are prosecuted.

The act of March, 1803, which confers the right of appeal from decrees in Chancery, subjects such appeals to the rules and regulations which govern writs of error; under this act it has always been held that an appeal may be prayed in court at the time the decree is pronounced, but if the appeal be prayed after the Court has risen, the party must proceed in the same manner as had previously been directed in writs of error.

Yeaton vs. *Lenox*, 7 *Pet.*, 220 (*opinion by Chief Justice Marshall*);

wherein it was held that the record having been brought up irregularly, the cause must be dismissed.

See

Faw vs. *Marsteller*, 2 Cranch, 10, particularly the foot note.

Peyton vs. *Brooke*, 3 Cranch, 92.

wherein Chief Justice Marshall said:

"We wish to give general notice to the gentlemen of the "bar that unless statements of the case are furnished ac-"cording to the rule, the cause must either be dismissed "or continued."

By "according to the rule," his Honor undoubtedly meant, according to the statute; that is, those sections of the Judiciary act theretofore passed and hereinbefore cited.

See also

The Catharine, 7 Cranch, 99.

Counsel for appellees recognize, as of course, the practice of this Court to consider Chancery cases *de novo* on all the evidence and pleadings in the case, *when properly brought here from the Circuit Courts*. Our books of learning are full of cases iterating and reiterating this rule of practice.

Murdock vs. *City of Memphis*, 20 Wall., 590, 621, 622, 623.

But we respectfully urge that the *manner of presenting the appeal* is of the essence of the matter. It must be presented in conformity to the rules of practice and the requirements of the statute, or the Court cannot entertain it.

Murdock vs. *City of Memphis*, 20 Wall., 590, 625.

Villabolos vs. *United States*, 6 How., 81.

Castro vs. *United States*, 3 Wall., 46, 49.

We submit, moreover, that, under the circumstances of this case, we are not within the particular ruling of the case of *Flanders* vs. *Tweed*, 9 Wall., 425, but rather that we come fairly within the general rule declared in that case, to wit, that, according to the general course of proceedings of this Court in cases of this kind, the judgment below ought to be affirmed. Neither are we within the rule declared in the case of *School District of Ackley* vs. *Hall*, 106 U. S., 428, because in that case, although the reporter includes no statement of facts, it may be assumed from the language of the Court that there was some especial equity which entitled the prevailing party to the ruling therein made.

IV.

When the United States voluntarily becomes a suitor in a Court of Chancery, it stands upon the same footing, qua suitor, as a private individual.

This is especially the rule when the United States is a party to a suit in equity in one of the courts of the United States, and in such a case, the proposition for which we here contend is settled law.

Fink vs. *O'Neil*, 106 U. S., 272.
United States vs. *Tellow*, 2 Lowell, 159.
United States vs. *Flint*, 4 Sawy., 42.
Fendall vs. *The United States*, 14 Ct. of Cl., 247.
United States vs. *White*, 17 Fed. Rep., 561.
United States vs. *Colgate*, 21 Fed. Rep., 318.
United States vs. *The Union National Bank*, 10 Ben., 408.

So also the Government is not exempt from the fundamental rule that he who asks equity must do equity.

Brent vs. *The Bank of Washington*, 10 Pet., 596, 615.
United States vs. *Flint*, 4 Sawy., 42.

In this case, therefore, if the United States seek to set aside our patent upon the ground of fraud or upon any other ground, the Government, in conformity to the rule applicable to other suitors who seek to rescind for fraud, must first tender to us the purchase price.

In *United States* vs. *White*, 17 Fed. Rep., 561, this precise question was involved and the Court held that there must be an antecedent tender of the purchase price.

Neblett vs. *MacFarland*, 92 U. S., 101, 103.

Where the Court sets forth the general rule here applicable in the following language: "In cases of this character the "general principle is, that he who seeks equity must do "equity; that the party against whom relief is sought shall "be remitted to the position he occupied before the transac- "tion complained of. The Court proceeds on the principle, "that, as the transaction ought never to have taken place, "the parties are to be placed as far as possible in the situa- "tion in which they would have stood if there had never "been any such transaction. *Bellamy* vs. *Sabine*, 2 Phil., "425; *Samy* vs. *King*, 5 H. L., 627; *W. B. of Scotland* vs. "*Addie*, L. R., 1 Scotch App. Cas., 162; *Gatley* vs. *Newell*, "9 Ind., 572; *Johnson* vs. *Jones*, 13 Sm. & M., 580; Kerr "on Fraud, 335, 343." This is, no doubt, the general rule. See also

Grides vs. *Sanders*, 93 U. S., 55.

Conceding the rule that the Court will not impute laches to the Government, and that the Government may not be barred by a State statute of limitations from suing in one of its own courts, counsel for the appellee respectfully insist that such exemptions cannot be claimed to apply in cases where the Government sues merely to assert the alleged claims of some third parties.

Hayner vs. *Stanly*, 13 Fed. Rep., 217.
United States vs. *White*, 17 Fed. Rep., 565.

The Statute of Colorado makes an adverse possession under color of title for a period of five years a complete bar to an action for ejectment.

"That every person in the peaceable and undisputed "possession of lands or tenements, including mining claims "under claim and color of title, made in good faith, * * * "who shall for five successive years hereafter continue in "such possession, * * * shall be held and adjudged to be "the legal owners of said lands." (Sec. 2186).

"The two preceding sections shall not apply to lands or

"tenements owned by the United States, except as to the "possessory rights of parties claiming to hold such lands "*or mining claims under and in accordance with the laws* "*of the United States*, the laws of this State, and the min- "ing laws, regulations and customs of the several mining "districts wherein such land or mining claims may be situ- "ate." * * * (Sec. 2188.)

"In all cases at law or in equity brought to recover the "possession of any lands, tenements or mining claims, ex- "cept in actions of ejectment, the party defendant may "plead such possession, payment of taxes as aforesaid, in bar "of such action, and on failure to plead such possession "and payment of taxes, the right of the said defendant to "avail himself of the benefit of said statute shall be deemed "waived by the said defendant." (Sec. 2189).

Gen. Stat. of Colo., Sec. 2186 to 2189.

And in cases where relief is demanded upon the ground of fraud, suit must be commenced within three years after the discovery of the fraud.

"Bills for relief, on the ground of fraud, shall be filed "within three years after the discovery by the aggrieved "party of the facts constituting such fraud, and not after- "wards."

Gen. Stat. of Colo., Sec. 2174.

The bill, moreover, must, in a case where it is filed more than three years after the fraud complained of should presumably have been discovered, specify the time when the fraud was actually discovered.

The case at bar, furthermore, involving the title to mining property, is one in which the doctrine of laches is more strictly insisted upon than in other cases.

It follows, therefore, necessarily that the Government cannot, any more than any private litigant, take advantage of its own default or of the negligence, mistake or fraud of its duly accredited agents. In this case, if the decree shall

go for the appellant, the default of the Register the government officer, in failing to advertise the amendment to survey will avail the Government as against the appellees, years after the expenditure by the Marshall Silver Mining Company, and subsequently by its vendee, of about fifty thousand dollars on work and improvements, and a proportion of four hundred thousand dollars in purchase money. It is not believed that the Court will give even the Federal Government such an undue and inequitable advantage over its own citizens in a court of equity.

V.

The United States cannot maintain a bill to set aside a patent when it has no substantial interest in the controversy, and where the real contention is between two sets of private parties, each claiming the title.

This rule is established by the recent decisions of the Court in the cases of the *United States* vs. *San Jacinto Tin Co.*, 125 U. S., 273, and the *United States* vs. *Beebe*, 127 U. S., 338.

The only exception to the rule so lately stated in these cases under which appellant could have color to claim to come, would be that the United States were bound to make good its title to one of the claimants, and in this case to the Cayuga.

But it was under no contract or moral obligation so to do. The Cayuga, when the Marshall Company paid its money and entered the land, was only pressing an *ex parte* proceeding to perfect title. It had not paid its money, made entry and received a vested right, and its title and right were junior to those of the Compass and Square claim.

The Yosemite Valley Case, 15 Wall., 77.

We contend that the No. 5 patent, if invalid at all, was necessarily either void or voidable. If void, the Cayuga patent, as soon as it was issued, gave its owners a complete remedy at law upon which they could have maintained ejectment, which would oust the jurisdiction of equity; and if voidable the only remedy was by proceedings in the name of the injured parties to have the senior patentee declared to hold in trust for the junior.

Johnson vs. *Towsley*, 13 Wall., 72.
Hayner vs. *Stanly*, 13 Fed. Rep., 217.

The ground cannot revert to the Government of the United States if this patent should be set aside. It would go to an adverse claimant, who has been at one time a latent contestant for it since 1871. Hence the Government of the United States has no interest in the result. It is not an indemnitor of the claimants of the Cayuga lode patent, issued in 1882, to make good their title, inasmuch as these claimants obtained their patent after a patent had previously been issued by the Government of the United States on the same ground, and with knowledge that such patent had been issued; and such second patent was issued simply for the purpose, if it had any purpose at all, to give a colorable basis for the maintenance of this action. And such parties must be made parties to the bill.

United States vs. *Central Pacific R.R. Co.*, 11 Fed. Rep., 449, 458.

VI.

The only possible ground upon which the obligation of the Government to make good the Cayuga claim as against the Marshall Silver Mining Company can rest, is that the Cayuga claimants have a prior title and a superior equity, which have been neither lost nor impaired by laches, abandonment, neglect or non-compliance with law.

It has been shown that the irregularities in the Cayuga patent are greater and more essential than those in the patent attacked in the bill, or than those, if any there be, which affect the later patent.

This second patent is tainted by irregularities infinitely worse than any which are laid to the door of the patent issued to the Marshall Silver Mining Company. It was issued without any new application, without new advertisement, eight years after the application had been previously cancelled and stricken from the record and while it remained cancelled in the local Land Office, without any notice to any person; during all which time the Marshall Silver Mining Company or its vendees were in possession, without intimation from any source of the now alleged irregularity in the No. 5 patent.

When the No. 5 was entered and patented, supposing it was upon a wrongful ruling, the duty of the Cayuga claimants was to appeal. Or if they failed to appeal they could file their bill to have the patentee of No. 5 declared trustee to the extent of the conflict. Upon the passing of its title to the Marshall Company (also upon *ex parte* proceedings) the Government parted with all interest in the land, and it henceforth became a controversy between the claimants of

the ground, either for the No. 5 to maintain its legal title or for the Cayuga to have the No. 5 patent declared to be held in trust for its benefit. But the Cayuga claimants, with full notice of the abandonment of their claim and the prosecution of the Marshall claim to patent and of the transfer to *bona fide* purchasers, slept on their rights, if any they ever had.

VII.

There was no fraud whatsoever in the procurement of the patent.

The Chancellor will not infer fraud from mere allegations in the bill; neither can fraud in fact be found in equity on less evidence than would be required to authorize a jury to find the same fact at law. In such a case as this, therefore, fraud must be proved as alleged in the bill, or such circumstances must be shown to exist as warrant a Court of Chancery in the presumption of fraud. This is conceded learning.

Marksbury vs. *Taylor*, 10 Bush., 519.

The proof in this case is, it is to be observed, wholly silent on the allegations of fraud, neither was there any attempt whatsoever to fasten such notice or knowledge upon us as might vitiate our title. The brief of the counsel who appear and are allowed to speak in the name of the United States attempts, however, to make a case of constructive fraud. In this we cannot follow him, for it would only mislead the Court in pursuit of shadows. The bill charged that the Register and Receiver and the attorneys and officers of the Marshall Company conspired together to obtain the withdrawal of Rist and a pretended adjudication upon such withdrawal (p. 5). The complain-

ant offers no testimony whatever on this averment. On the contrary, we call several of the parties designated, who show the whole thing to have been the voluntary action of Rist himself. And as strong collateral confirmation of their positive testimony was the fact that two years before, in 1871 (page 182), he had personally dismissed or attempted to dismiss the law proceedings begun in the territorial court over the same controversy in its original shape, and that all that was done thereafter was in conformity with the usual practice of the local land office.

VIII.

There was no irregularity, mistake or inadvertance in the issue of the patent. Mere technical and trifling irregularities, if any there were, are no ground for maintaining this action.

But is this irregularity sufficient to even render the patent voidable?

The want of authority which makes a patent void means a total want of authority to issue the patent; not a latent impropriety in issuing the patent.

Kahn vs. *Old Telegraph Mining Co.*, 2 Utah, 174.

There was a question for the Register and Receiver to pass upon. They did pass upon it in a semi-judicial capacity.

Johnson vs. *Towsley*, 13 Wall, 72.

No appeal was taken. Did it not become *res adjudicata?* And was not the decision right in the first instance?

Conceding for the sake of argument that the requirement that there be sixty days publication is mandatory, and that a patent issued without such publication would be voidable, nevertheless, if this land was not advertised in the No. 5 application it was advertised in the Cayuga application. It was thus in fact advertised at least once, if not twice, each application being a proceeding *in rem.* The entire papers on both applications are in evidence, and they develop the fact that the only claimants to this land were the No. 5 owners and the Cayuga claimants, and, therefore, so far as the United States Government, the patentors, is concerned, the land was advertised in compliance with law, and the question comes back as to which of two claimants are entitled to it.

It is manifest that both these parties were after the same ground. It seems, further, self-evident that when the Land Office set aside the Cayuga application the Cayuga claimants considered the matter at an end, and never attempted to revive it until the sudden life given to their proceedings by the action of the Department in 1881 (p. 119). Arnold, Receiver, states that official notice was given, and his personal recollection that he learned it was received. Brune, the surveyor (p. 97) says he gave McClellan notice shortly after the withdrawal of the application, and Marshall (p. 112) says he informed his attorney.

It would be an incredible fact, if living in the immediate vicinity they did not know of every incident. Besides, knowledge is not needed where the parties were in interest, and the whole matter was spread on the face of their own records; in such case notice is imputed.

IX.

Upon the facts as proved there can be no pretence that the patent was issued illegally and without authority of law.

The Government owned the land and had power and title to convey.

It is not sufficient, in order to avoid a patent, to show that there may have been error in adjudging the title to the patentee. It must appear that, by the law properly administered, the title should have been awarded to the claimant; that is to say, mere technical or minor irregularities in respect of the issue of the patent are not sufficient to invalidate it.

> *Bohall* vs. *Dilla*, 114 U. S., 47, 51 (citing *Smelting Company* vs. *Kemp*, 104 U. S., 636, 647, and *Bogg* vs. *Merced Mining Company*, 14 Cal., 279, 363).

This is also the rule declared in *Sparks* vs. *Pierce*, 115 U. S., 408, 413, and it is perhaps a refinement upon the general rule that in an action of ejectment the plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary's.

If fraud or mistake is charged, and if upon that ground it be alleged that the patent was improperly issued, the burden is upon the claimant to clearly establish such fraud or mistake, and, in order that it may avail to invalidate the patent, it must appear that the fraud affected the decision of the Land Office, and that but for such fraud the claimant would be entitled to the patent.

> *Lee* vs. *Johnson*, 116 U. S., 48.

The rule that "he who is first in time is prior in right," as declared in *McCreery* vs. *Haskell*, 119 U. S., 327, must

be interpreted in the light of the further rule therein especially emphasized, that the assertion of the prior title must be a *continuous*, open and notorious claim. A claim that is merely prior in time will be, if it has been abandoned, no ground for an invalidation of a later patent.

See also, as supporting our contention:

Glacier Mountain Silver Mining Company vs. *Willis*, 127 U. S., 471, 481.

United States vs. *Beebe*, 127 U. S., 338.

Moore vs. *Steinbach*, 127 U. S., 70.

United States vs. *The San Jacinto Tin Company*, 125 U. S., 273.

Maxwell Land-Grant Case, 121 U. S., 325.

X.

If this appeal is to be entertained at all it must, in view of the Government disclaimer of interest in the subject-matter of the litigation, be treated as a controversy between the Cayuga Claimants and the Colorado Central Consolidated Mining Company.

In such an action the Cayuga Claimants would have no standing and could not prevail because of the bar of the statute of limitations of Colorado.

Genl. Stat. Colo. (cited above).

But even if that statute were not a bar, these claimants would be estopped in equity by their own *laches* from asserting their title against the Colorado Central Consolidated Mining Company, inasmuch as the property

in question had been for at least ten years in the undisturbed possession of its vendors, the Marshall Silver Mining Company; had been operated as a mine by it; had been perfected by patent, and during the whole of the said period of time, or at any time prior to the purchase by the said Colorado Central Consolidated Mining Company of the property in question, and subsequent to the issuance of the patent by the United States Government, the claimants of the Cayuga commenced no action nor asserted any claim thereto, which would have served as notice, and thereby have prevented the purchase of Tunnel Lode No. 5 by the Colorado Central Consolidated Mining Company. The Cayuga claimants and the United States in their behalf are therefore estopped by *laches* from asserting a title to the detriment of the Colorado Central Consolidated Mining Company at this late day.

Cincinnati vs. *White*, 6 Pet., 431.
Manufacturers' & Traders' Bank vs. *Hazard*, 30 N Y., 226.
Elmendorf vs. *Taylor*, 10 Wheat., 152.
Piatt vs. *Vattier*, 9 Pet., 405.
Kennedy vs. *Georgia State Bank*, 8 How., 586.
Godden vs. *Kimmell*, 99 U. S., 201.

The Cayuga claimants, moreover, had actual notice in 1872 of the ruling of the local land office that their claim was cancelled.

1. By the official letter from the local land office (Statement, pp. 5 and 6, *supra*).

2. Bruné gave McClellan actual verbal notice (Statement, pp. 5 and 6, *supra*).

3. They had the notice of record; all the proceedings showing that their survey had been vacated, and that Tunnel Lode No. 5 had gone to patent, and that many other

lodes had been patented over ground, at some time prior to and during 1872, claimed by them were duly on record in the local land office.

4. They had notice of the cancellation through notice given to their attorney, Bradford, in 1873 (Statement, pp. 5 and 6, *supra*).

5. They were bound to take notice, and therefore in contemplation had notice of what took place in their own application for a patent between 1872 and 1881.

6. They had constructive notice upon the ground declared by this Court in the case of *Hughes* v. *United States*, 4 Wall., 232, 236, in the following language:

"The patentee cannot complain of the proceeding, for "the open, notorious, and exclusive possession of the "premises, by the parties claiming under Goodbee, when the "the patentee made his entry and received the patent, "was sufficient to put him upon inquiry as to the interests, "legal or equitable, held by them; and if he neglected to "make the inquiry, he is not entitled to any greater con-"sideration than if he had made it and ascertained the "actual facts of the case."

In the face of this notice, actual and constructive, as imputed to them in the language of the Court, the Cayuga claimants made no claim of title and did no work upon the claim from 1873 to 1881—two years after the property passed into the hands of the Colorado Central Consolidated Mining Company—although they resided within two miles of the ground in question, and were themselves at that time actively engaged in mining operations.

The Government having disclaimed interest, and the controversy thereby becoming practically one between private parties claiming the same tract, the doctrine of *Beard* vs. *Federy*, 3 *Wall.*, 478, 492, is applicable, to the

effect that a patent having been issued and recorded, all the requirements preliminary to the issue thereof have been fully complied with is presumed, and that this presumption is not open to rebuttal, as between such private parties.

See also

Smelting Co. vs. *Kemp*, 104 *U. S.*, 636.

XI.

Inasmuch as there is no equity in the Cayuga claim there is no equity in the bill.

In a suit to charge the holder as trustee for another, it is not sufficient to show that it was error to grant him that patent. It must further appear that it should have issued to the plaintiff, or that plaintiff was the rightful owner.

Bohall vs. *Dilla*, 114 *U. S.*, 47.

But if this No. 5 patent is to be set aside and the title to go to another, will this Court give it to one who has been affirmatively proved to have no valid possessory claim?

In the first place we prove by the witnesses Cox (p. 106), O'Bryan (p. 114), Kelso (p. 115), Hurd (p. 117), Old (p. 132) and Robeson (133) that they had no lode in their alleged discovery.

And when it comes to the location certificate we have an instance without precedent of four records made in four different directions so as to claim four locations from the same discovery shaft (see map inserted at page 223).

The four location certificates are found on pages 179, 180 and 181, made and recorded the same day by the same persons, from the same hole. Afterwards, when patent was

applied for, one of these records is taken and the others disclaimed. Instead of staking it out, as originally claimed, it is made to run at right angles to its original course, as the map referred to will show.

On the cross-examination of McClellan and Webster (pp. 78 and 86), there is a hopeless attempt by them to locate indefinitely on the mountain side holes that never existed, and would contradict the record if they did exist, for the record calls for the same identical spot.

In addition to this, the statute in force at that time allowed only 1,400 feet to be taken up by one location (Act of February 9th, 1866). In addition, the statutes since 1872 require $100 worth of work upon each claim each year until patented, and the uncontradicted testimony shows that from 1872 until after the issuance of the patent in 1882 the ground was never touched by the Cayuga parties. Or if it be said that we were in the adverse possession thereof, the same law which requires annual labor should not allow of such neglect that ten annual periods should pass without at least demand for possession.

No one out of possession can make application for a patent.

Copp's Mining Laws, p. 256 (*2d ed.*)

It is conceded that the Cayuga claimants were out of possession after 1871.

XII.

The Colorado Central Consolidated Mining Company is a bona fide purchaser for value and without notice, and is therefore a party which especially commends itself in such a case as this to the protective jurisdiction of a court of equity.

We contend that there is no evidence of fraud or mistake, and therefore no justification for a reversal of the decision of the Circuit Court even if the Marshall Silver Mining Company had been the only defendants herein. But even if there had been fraud by the Marshall Silver Mining Company in obtaining its patent, or mistake on the part of the Government in granting it, the Colorado Central Consolidated Mining Company, being a *bona fide* purchaser, is not affected thereby.

Colorado Coal and Iron Co. vs. *United States*, 123 U. S., 307.

See also statement of facts—*supra*.

From November, 1879, to January, 1880, the negotiations were pending which passed this title to the Colorado Central Consolidated Mining Company. The consideration paid by Turnbull was about $175,000, and by the Colorado Central Consolidated Mining Company $400,000, for property of which that previously owned by the Marshall Company was but a part. The sale was for cash from the Marshall Company and others to Turnbull, and for cash from Turnbull to the new company. There can be no honest pretence from the evidence, of a reorganization of the Marshall Co. Hall, who had been an officer of the Marshall Company, states that he owned but one share of its stock, and took no active part in its management.

The doctrine of innocent purchasers for value applies as

fully in cases where the United States is only a nominal party as in any other case.

The ground of exercising equity jurisdiction for the vacating of a patent by the United States is precisely the same as that which would justify a private individual in breaking and setting aside his own solemn act.

United States vs. *White*, 17 Fed. Rep., 561.

It must be either upon the ground of fraud or of glaring mistake of fact. The Government cannot set aside its own acts for the mistake of law of its own officials. There is no fraud in this case. What is proved at most is a mere irregularity, for which, as a basis, no private contract would be set aside as between the parties themselves, much less as between the vendor and innocent third parties. If this patent can be set aside on the grounds herein mentioned, all patents issued under the mineral laws are in jeopardy because any mistake in the procedure, however innocently made, can at the instance of adverse claimants who are disappointed in a contest before the Land Office, either local or at Washington, move the Attorney-General of the United States to vacate.

Colorado Coal and Iron Co. vs. *United States*, 123 U. S., 307.

See also

Smelting Co. vs. *Kemp*, 104 U. S., 636.
Steel vs. *Smelting Co.*, 106 U. S., 447.
The Yosemite Valley Case, 15 Wall., 77.
Maxwell Land-Grant Case, 121 U. S., 325.
Frisbie vs. *Whitney*, 9 Wall., 187.

No notice or knowledge of either Hall or Marshall, if proven, can be imputed to the Colorado Central Consolidated Mining Company. The relation between these parties was that of vendor and vendee. There was, therefore, no privity, and the dealing between them was at arm's length. Marshall was never a director of the Colorado Central Com-

pany, and Hall only became so a few years after the purchase, and he had no knowledge of the Cayuga claim.

XIII.

This bill could not be maintained to vacate the whole patent, even if the fraud and mistake alleged in the bill had been proved, because such alleged fraud and mistake cannot in any degree effect or taint the original survey of Tunnel Lode No. 5, approved December 10th, 1872.

In no sense and in no manner can a bill be maintained under the existing authorities as to the whole patent, even if the United States can maintain such an action for the benefit of the Cayuga claimants, when the Cayuga claimants are entitled to but a part of the ground thus covered; and whatever irregularity existed only affected such part.

From the evidence it is clear that the Compass and Square lode, also owned by the Marshall Silver Mining Company, was older and superior to the Cayuga claim. Hence there is no equity in that claim which affects either the Marshall Silver Mining Company or the Colorado Central Consolidated Mining Company.

XIV.

The judgment of the Court below should be affirmed, with costs.

SIMON STERNE,
R. S. MORRISON,
Solicitors and of Counsel for Appellees.